Office - Supreme Court, U.
FILED
AUG 17 1983
ALEXANDER L. STEVAS
CLERK

83-256

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARRISON A. WILLIAMS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ERWIN N. GRISWOLD
Counsel of Record
CLAIRE L. SHAPIRO
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 861-3898

GEORGE J. KOELZER
JOEL N. KREIZMAN
EVANS, KOELZER, OSBORNE,
KREIZMAN & BASSLER
P. O. Box BB
Red Bank, New Jersey 07701

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the trial court committed prejudicial error when, in response to a specific question from the jury, it instructed the jury to determine predisposition by focusing on the time when the accused committed the crime.

2. Whether the Government's (a) initiation of an "investigation" without any predicate, (b) continuation of that investigation with active efforts to develop crime for nearly five months before any criminal opportunity was presented to the accused, and (c) offering exorbitant financial inducements while saying that the accused's statements need never be acted upon, was so outrageous as to violate due process of law.

3. Whether extensive warrantless electronic surveillance is consistent with the Fourth Amendment, when it is conducted in the absence of some basis for suspicion of criminal activity.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	2
I. Introduction	2
II. Facts	3
III. Procedural History	10
REASONS FOR GRANTING THE WRIT	12
I. THE SUPPLEMENTAL INSTRUCTION ON THE TIME FOR DETERMINING PREDISPOSITION MISSTATED THE LAW IN A FUNDAMENTAL MANNER	12
A. The Entrapment Defense Established by This Court Determines Predisposition by Focusing on the Time When the Government Began Its Efforts to Induce the Alleged Offense	12
B. The Improper Supplemental Charge Warrants Reversal	17
II. THE ACTIONS OF THE GOVERNMENT WERE SO OUTRAGEOUS THAT THEY AMOUNT TO A DENIAL OF DUE PROCESS OF LAW	20

TABLE OF CONTENTS—Continued

Page

A. The Lower Federal Courts Have Been Unable to Define the Government Conduct Prohibited by the Outrageousness/Due Process Defense 20

B. The Due Process Limits on Government Conduct in a Bribery Investigation Should Be No Broader Than Those Established by the Department of Justice and the F.B.I. to Ensure the Fairness of the Abscam Operation.... 23

C. The Government's Conduct During Its Investigation of Senator Williams Was Outrageous 24

III. UNDER THE CIRCUMSTANCES OF THIS CASE, INCLUDING THE ABSENCE OF A PREDICATE, THE EXTENSIVE ELECTRONIC SURVEILLANCE, WITHOUT A WARRANT, WAS A VIOLATION OF THE FOURTH AMENDMENT 27

CONCLUSION 30

APPENDICES (separately bound):

A. Opinion of United States Court of Appeals for the Second Circuit 1a

B. Opinion of United States District Court for the Eastern District of New York 46a

C. Judgment of United States Court of Appeals for the Second Circuit 88a

D. Order of United States Court of Appeals for the Second Circuit Denying Petition for Rehearing 90a

E. Entrapment Charge Given by the United States District Court for the Eastern District of New York 92a

TABLE OF AUTHORITIES

Cases: Page

Arroyo v. *Jones*, 685 F.2d 35 (2d Cir. 1982) 18
Brewer v. *Williams*, 430 U.S. 387 (1977) 22
Criden v. *United States*, No. 82-1240, *cert. denied*, 103 S. Ct. 2437 (1983) 2
Desist v. *United States*, 394 U.S. 244 (1969) 28
Hampton v. *United States*, 425 U.S. 484 (1976) 12, 20
Jannotti v. *United States*, *cert. denied*, 457 U.S. 1106 (1982) 2, 26
Katz v. *United States*, 389 U.S. 347 (1968) 28
Kotteakos v. *United States*, 328 U.S. 750 (1946) ..17, 19-20
Lederer v. *United States*, No. 82-1183, *cert. denied*, 103 S. Ct. 2437 (1983) 2
Lopez v. *United States*, 373 U.S. 427 (1963) 29
Miranda v. *Arizona*, 384 U.S. 436 (1966) 22
Murphy v. *United States*, No. 82-1187, *cert. denied*, 103 S. Ct. 2437 (1983) 2
Myers v. *United States*, No. 82-1255, *cert. denied*, 103 S. Ct. 2438 (1983) 2
On Lee v. *United States*, 343 U.S. 747 (1952) 29
Sherman v. *United States*, 356 U.S. 369 (1958) ..12, 14-16
Sorrells v. *United States*, 287 U.S. 435 (1932) 12, 14-16
Spano v. *New York*, 360 U.S. 315 (1959) 22
Terry v. *Ohio*, 392 U.S. 1 (1968) 28
Thompson v. *United States*, No. 82-1199, *cert. denied*, 103 S. Ct. 2437 (1983) 2
United States v. *Batres-Santolino*, 521 F. Supp. 744 (N.D.Cal. 1981) 21, 22, 27
United States v. *Jannotti*, 501 F. Supp. 1182 (E.D. Pa. 1981) 21, 25
United States v. *Jannotti*, 673 F.2d 578 (3d Cir. 1982) 22, 26
United States v. *Kelly*, 539 F. Supp. 636 (D.D.C. 1982) 21
United States v. *Kelly*, 707 F.2d 1460 (D.C. Cir. 1983) 22
United States v. *Marcello*, 537 F. Supp. 402 (C.D. Calif. 198?) 27
United States v. *Myers*, 527 F. Supp. 1206 (E.D. N.Y. 1981) 21

TABLE OF AUTHORITIES—Continued

Page

United States v. *Russell*, 411 U.S. 423 (1973) 12, 16, 20
United States v. *Twigg*, 588 F.2d 373 (3d Cir. 1978) 21, 22
United States v. *White*, 401 U.S. 745 (1970) 27-30

Constitution and Statutes:

Fed.R.Crim.P. 12(f) 30
18 U.S.C. § 201(c) 10
18 U.S.C. § 201(g) 10
18 U.S.C. § 203(a) 10
18 U.S.C. § 371 10
18 U.S.C. § 1952 10
28 U.S.C. § 1254(1) 2
U.S. Const. Fourth Amendment 2, 27-28
U.S. Const. Fifth Amendment 2

Miscellaneous:

Devitt & Blackmar, FEDERAL JURY PRACTICE & INSTRUCTIONS (3d ed. 1977) 16, 21
Green, THE STING MAN: THE INSIDE STORY OF ABSCAM (1981) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-

HARRISON A. WILLIAMS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Harrison A. Williams, Jr. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on April 5, 1983.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 705 F.2d 603, and is reprinted in Appendix A (*infra*, pp. 1a-45a). The opinion of the United States District Court for the Eastern District of New York on due process questions is reported at 529 F. Supp. 1085, and is reprinted in Appendix B (*infra*, pp. 46a-87a).

JURISDICTION

On April 5, 1983, a panel of the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court. The judgment is reprinted in

[1] Parties involved: In addition to the petitioner, Alexander Feinberg was an appellant in the proceedings before the Second Circuit. He has filed a petition: No. 83-5108.

Appendix C (*infra*, pp. 88a-89a). A petition for rehearing, with a suggestion for rehearing *en banc*, was denied on May 24, 1983. The order denying rehearing is reprinted in Appendix D (*infra*, pp. 90a-91a). By an order signed on July 7, 1983, Justice Marshall extended the time for filing the petition to and including August 22, 1983.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

I. Introduction

This is one of a series of cases arising out of the F.B.I.'s Abscam investigation. Although this Court has denied certiorari in the earlier cases,[2] strong factual and legal distinctions justify the grant of certiorari in this case.

With the exception of Senator Williams, each of the other Congressmen was lured into Abscam by a clearly

---

[2] Certiorari was denied in *Lederer* v. *United States*, No. 82-1183, *Murphy* v. *United States*, No. 82-1187, *Thompson* v. *United States*, No. 82-1199, *Criden* v. *United States*, No. 82-1240, and *Myers et al.* v. *United States*, No. 82-1255, on May 31, 1983. *See* 103 S. Ct. 2437-38. Certiorari was also denied in *Jannotti* v. *United States*, 457 U.S. 1106.

illegal proposal—the promise of money in exchange for the introduction of immigration legislation on behalf of a rich Arab sheik. Moreover, each of the other Congressmen was identified by a middleman as a person willing to accept a bribe and, in fact, each of them did accept a cash bribe (ranging from $5,000 to $50,000) after one or two meetings with representatives of the sheik.

The Government's attempts to develop a criminal case against Senator Williams, described below in some detail, had a different origin and followed a very different path, making this the only case where the issue of entrapment was fully litigated. These distinctions make this the ideal case for the Court to give further definition to the defenses available to a defendant when the Government has actively participated in the creation of a crime.

II. Facts[3]

In January, 1979, Angelo Errichetti, the Mayor of Camden, New Jersey, met with Senator Williams at the

---

[3] A copy of the transcript of the Williams-Feinberg trial, the due process hearing, and the tape transcripts, has been lodged with the Clerk of this Court. Citations to this record will be made as follows:

a. Testimony in the Williams-Feinberg trial—T (*page*). The trial transcript is reproduced in the green volumes (numbered 1 through 5), reprinted for the Senate Select Committee on Ethics.

b. Exhibits in the Williams-Feinberg trial—Ex. (*number or letter*). Tape transcripts are also cited to their page in the green volume (number 6), reprinted for the Senate Select Committee on Ethics—(Sen. Comm. Print, Pt. 6, p. (*page*)).

c. Testimony in the Williams-Feinberg due process hearings —DP (*page*). The due process transcript is reproduced in the blue volume, reprinted for the Senate Select Committee on Ethics.

d. Exhibits in the Williams-Feinberg due process hearings —DP Ex. (*number*).

reopening of a navy shipyard. T 4232-33. Errichetti told the Senator about a wealthy Arab sheik who was looking for investment and financing opportunities in the United States. *Id.* The Senator conveyed the news of this apparently legitimate opportunity for financing to two close friends, Alex Feinberg and Sandy Williams (no relation), who were seeking funding for a titanium mining venture aimed at the production and sale of paint pigment. T 1582, 4234. Those two friends got in touch with Errichetti, who relayed their request for financing back to the Government agents and, at the same time, linked those individuals to Senator Williams. T 616-17.

The Government had absolutely no reason at that time to suspect Senator Williams of any past, present, or future wrongdoing. Even Thomas Puccio, the prosecutor in the case, admitted that there was no reason "to question Williams' integrity before his name came up in this case." DP 413-14. And F.B.I. Agent Goode, who was in charge of the Abscam operation, admitted they were starting with a "clean slate" so far as Senator Williams was concerned. DP 778. Nevertheless, without any attempt to determine whether the Senator was in fact corrupt, the F.B.I. promptly began its affirmative efforts to implicate the Senator in wrongdoing.[4]

Representing themselves to be employees of a wealthy Arab sheik, they scheduled a meeting with the Senator's friends for the very next day (January 11, 1979). At the meeting, Sandy Williams described the mining property, confirmed the viability of the venture, identified potential customers for the various products (a nearby foundry for iron ore and several paint companies for

---

[4] There is a very disturbing aspect to this. The record shows that the Government operatives knew that Senator Williams once had an alcohol problem. Ex. 13A, p. 8 (Sen. Comm. Print, Pt. 6, p. 90). Based upon this fact, Mel Weinberg, in a book written about his activities, described Senator Williams as "typical of many former alcoholics, warm wax waiting to be impressed." R. W. Green, THE STING MAN: THE INSIDE STORY OF ABSCAM 159 (1981).

titanium slag), and asked for a loan of $12-13 million. T 1583-85. There was no suggestion at this meeting that government contracts, or any other impropriety, were involved. *See* T 664. As supervising F.B.I. Agent Goode later testified, the mining venture "was on initial appearance, a legitimate operation." DP 894.

Despite the absence of any indicia of criminality, the Government agents expressed serious interest in financing the mining project, and in mid-March used a government plane to fly undercover F.B.I. agents with Sandy Williams and George Katz (an investor in the mine) to view the property. T 620, 1586. Sandy Williams mentioned another plant that was capable of processing the titanium slag from the mine into titanium dioxide, the ingredient actually used as white paint pigment. T 1248-49, 1587. Once again, however, there was no reference during the visit to government contracts or any other form of impropriety. T 681-82.

But the Government was not deterred. They invited Senator Williams to a party given by the "sheik" in Florida on March 23, 1979, purportedly to honor Mayor Errichetti, and at the party suggested to the Senator that he get directly involved in financing the mine. *See* Ex. 2A, pp. 18-20 (Sen. Comm. Print, Pt. 6, pp. 20-22). Shortly after this party, the Government upped the ante by agreeing to provide $100 million in financing for the apparently legitimate business venture.[5] Ex. 4A, pp. 4-5, 8 (Sen. Comm. Print, Pt. 6, pp. 40-41, 44).

With this foundation laid, the Government operatives switched the focus of the venture from titanium dioxide for paint pigment (the only product in which Senator Williams and his associates were interested) to government contracts for titanium metal, which, they suggested,

---

[5] Even the Second Circuit admits that "the $100 million loan was initially discussed in connection with what appeared to be an entirely legitimate business transaction". *United States* v. *Williams*, 705 F.2d at 621; App. 38a.

Senator Williams could help to obtain. The first reference to government contracts came on April 23, 1979, after three and a half months of extensive government build-up, when Melvin Weinberg, the Government operative, bluntly asked Sandy Williams:

MW: Alright, now what about uh, let me ask you a question. There's a lot of government contracts that, ya know, on the chemicals.

SW: Right.

MW: Now, can Williams get us the bids on them?

Sandy Williams rejected the notion, making it clear that such a plan of action had not been anticipated or even considered.

SW: Well, I don't know about that. The main thing is with this Cyanamid thing . . . .

MW: Yeah.

SW: They've got customers they've had for twenty, thirty and forty years.

MW: Right.

SW: And if established business and, of course, big big people that buy are paint manufacturers.

MW: Right.

SW: And if we wanna increase our business, we'll have to, we'll have to go into like Sherwin-Williams and people like that and try to get their business away from somebody else.

Ex. WQ, p. 4 (Sen. Comm. Print, Pt. 6, p. 375).

The Government ignored this negative response, and scheduled a May 31, 1979 meeting with the Senator and his friends. Prior to the meeting, a Government agent broached the government contracts idea with Alex Feinberg. Feinberg, like Sandy Williams, made it clear that he had not previously considered government contracts as part of the deal.

TD: Is he going to be able to steer any kind of contracts from the Committee that he's on toward, toward the operation that we're going to get involved with? I mean . . .

AF: Well, this I didn't know until now I have to ask him that.

Ex. 7A-2, p. 1 (Sen. Comm. Print, Pt. 6, p. 54).

Thus, the critical element of criminality supporting Senator Williams' conviction, an agreement on his part to get government contracts for the mining venture, was nothing planned, contemplated, or originated by Williams. It was solely a product of the affirmative action of the Government operatives. Moreover, as the Government conceded in its brief below, it was May 31, 1979, after this Government plan to foment crime had been going on for nearly five months, before the Government made its first "presentation to him [Senator Williams] of a corrupt proposal." Gov't Brief in Ct. of App., p. 76. So even if the Senator did accept the criminal opportunity at the May 31 meeting (and there is a dispute about what actually occurred at that meeting), that acceptance must be viewed as the product of the months of Government activities preceding it.

The Government's efforts to create a crime intensified after the direct criminal proposal was presented. At the suggestion of his supervisors, Mel Weinberg scheduled a direct meeting between Senator Williams and the sheik. Ex. 10A, pp. 4-6 (Sen. Comm. Print, Pt. 6, pp. 73-75). In anticipation of that meeting, Weinberg increased the pressure on the Senator's friends to force the Senator into expressly agreeing to get government contracts, told the Senator's friends exactly what he would be expected to say, and assured the Senator and his friends that the Senator would never have to act upon his promise. The following are typical of Weinberg's comments:

I personally think Feinberg's jerking us off . . . Let Tony and you speak to Senator . . . and all we want to hear from him is that he's going to get us some

> Government contracts . . . . [He later added] I don't think he's got the fucking balls to control Williams . . . . Well, you straighten, you get a hold of Pete and straighten him out."

Ex. WR, p. 4 (Sen. Comm. Print, Pt. 6, p. 396); Ex. WS, pp. 5, 7 (Sen. Comm. Print, Pt. 6, pp. 406, 408).

• • • •

> the Senator's gotta be told alright? In no certain terms that he's gotta move his fucking ass to get the goddamn government contracts.

Ex. 10A, p. 2 (Sen. Comm. Print, Pt. 6, p. 71).

• • • •

> All bullshit . . . . And that's it, it goes no further, it's all talk, all bullshit . . . . You're on stage for twenty minutes.

Ex. 14A, pp. 4, 5, & 7 (Sen. Comm. Print, Pt. 6, pp. 96-97, 99). *See also* Ex. 13A (Sen. Comm. Print, Pt. 6, p. 87).

Finally, Weinberg met personally with Senator Williams and Errichetti immediately before the June 28 meeting with the sheik. In an almost unbelievable and surely inexcusable manner Weinberg told the Senator again and again, and in strong terms, precisely what to say. *See* Ex. 14A (Sen. Comm. Print, Pt. 6, pp. 93-103). Excerpts from this "coaching" session forcefully illustrate the point.

> Forget the mine. Don't even mention the mine . . . . How high you are in the Senate. He's interested in you . . . . Who you know in the Senate can do you favors . . . how important you are. Without, without you there is no deal. You are the deal. You put this together. You worked on this and you can get, you got the government contracts. Without me there is no government contracts. . . . You know the names to mention . . . .
>
> You gotta just play and blow your horn. The louder you blow and mention names, who you control.

Ex. 14A, pp. 2-3, 6 (Sen. Comm. Print, Pt. 6, pp. 94-95, 98). Influenced by Weinberg's insistent pressures and certain that he would never have to act on his words, Senator Williams talked about his connections with influential members of Government. *See* Ex. 15A (Sen. Comm. Print, Pt. 6, pp. 104-130). In addition, although he never expressly guaranteed government contracts, he responded favorably to statements by others concerning his ability to obtain them.

But the Government still was not satisfied. They invented and tried to implicate the Senator in two new criminal scenarios. The first involved an exorbitant financial lure. In September, 1979, the Government created a second group of Arabs interested in buying the mining venture at a $70 million profit. T 1120-21; *see* Ex. 23A, pp. 18, 25 (Sen. Comm. Print, Pt. 6, pp. 225, 232). Of course, the Government operatives asserted that this second group of Arabs also insisted upon the Senator's help to get government contracts. *See* Ex. 23A, pp. 17-18 (Sen. Comm. Print, Pt. 6, pp. 224-25).

In the second scenario, implemented in January of 1980, the Government tried to catch Senator Williams in the money-for-immigration-assistance scam that had worked so well with the other Congressmen. Contrary to the practice in the other cases, however, when the Government set up the "asylum scenario" meeting between the Senator and the sheik they intentionally and inexcusably refrained from mentioning the bribe possibility to Senator Williams and his associates. DP 479-80, 1132. Thus, the Senator had no reason to think that the meeting with the sheik had any illegal purpose. Indeed, his statements at the meeting show that he anticipated a purely legitimate transaction. *See* Ex. 25A, pp. 2-5 (Sen. Comm. Print, Pt. 6, pp. 349-52). Moreover, in striking contrast to the other Congressmen, Senator Williams directly and repeatedly refused the offer of money.

RF: I, I will for, for your help, er, assistance and assistance—I would like to give you, er, you know, some money for, for permanent—

HW: No.

RF: —residence.

HW: No, no, no. This, this is when I work in that area, that kind of activity, it is purely a public not er, no.

Ex. 25A, pp. 8-9 (Sen. Comm. Print, Pt. 6, pp. 355-56).

In sum, then, the Government's unrelenting efforts to cause the clear and unambiguous commission of a crime continued unabated for a full year, at which time further activities were precluded by massive press leaks.

III. Procedural History

On October 30, 1980, Senator Williams was indicted in the Eastern District of New York for violations of 18 U.S.C. §§ 201(c) (bribery), 201(g) (conflict of interest), 203(a) (accepting an illegal gratuity), 371 (conspiracy), and 1952 (Interstate Travel Act). He pleaded not guilty on all counts, and took the stand to explain his statements and actions. At the same time, he claimed that the Government's actions in this investigation constituted entrapment and outrageous conduct, in violation of his due process rights.

The entrapment defense was presented to the jury for decision. The district court judge gave a lengthy and involved instruction on the law of entrapment. T 5572-80.* In brief, he told the jury that the defendants need only show Government inducement, at which point the burden shifts to the Government to show that the defendants were predisposed beyond a reasonable doubt to commit the crimes charged. The judge also discussed in some detail the meaning of predisposition.

---

* The full text of the district court's entrapment charge, given twice (T 5572-80, 5700-07), is set forth in Appendix E, *infra*, pp. 92a-96a.

Several hours after beginning deliberations, a confused jury asked the judge to explain the entrapment defense one more time. T 5673. At the judge's request, the jury formulated several specific questions pertaining to entrapment, including a crucial question inquiring about the point in time at which predisposition must be established.[7] T 5698. Following an extended colloquy with counsel, T 5685-95, the judge instructed the jury that predisposition should be determined as of the time when the crime was committed. T 5698-99. The judge then repeated his original lengthy entrapment charge. In this context, the jury returned a verdict of guilty on all counts of the indictment.

The Second Circuit stated unequivocally that the district court's supplemental instruction was erroneous, but decided that the error was not prejudicial. *United States* v. *Williams*, 705 F.2d at 618; App. 31a-32a. The appellate court reached this conclusion by focusing on May 31, 1979, the time when the Government admittedly first presented the criminal opportunity directly to Senator Williams, and by deciding that sufficient evidence existed to permit the jury to conclude that Senator Williams was predisposed at that point in time.

The outrageousness/due process defense was reserved by the judge for post-trial determination. The district court rejected the due process claim presented in this case, without indicating the parameters of the outrageousness/due process defense. *See United States* v. *Williams*, 529 F. Supp. 1085, 1097-1102 (E.D.N.Y. 1981); App. 65a-77a. The Second Circuit, while admitting that "we do not know what sort of circumstances the [Supreme] Court believes would meet this elusive standard," also

---

[7] The question asked by the jury was as follows:

> Does entrapment have to be established from day one of the indictment or can it be established further along in the operation?

rejected the due process challenges. *United States* v. *Williams*, 705 F.2d at 619-20; App. 35a.

REASONS FOR GRANTING THE WRIT

I. THE SUPPLEMENTAL INSTRUCTION ON THE TIME FOR DETERMINING PREDISPOSITION MISSTATED THE LAW IN A FUNDAMENTAL MANNER.

Over the past 50 years, this Court has decided four cases which have established and defined the general scope of the entrapment defense. These are *Sorrells* v. *United States*, 287 U.S. 435, *Sherman* v. *United States*, 356 U.S. 369, *United States* v. *Russell*, 411 U.S. 423, and *Hampton* v. *United States*, 425 U.S. 484. Despite these decisions, however, there is considerable uncertainty in the lower courts about the precise application of the defense. This case gives the Court the opportunity to clarify an important aspect of the law of entrapment, to the benefit of the public, the lower courts, and the bar.

A. The Entrapment Defense Established by This Court Determines Predisposition by Focusing on the Time When the Government Began Its Efforts to Induce the Alleged Offense.

After hearing lengthy instructions and commencing deliberations, the jury asked the district court judge to explain the entrapment defense once again. T 5673. At the judge's request, the jury formulated several more specific questions, including the following significant inquiry:

> Does entrapment have to be established from day one of the indictment or can it be established further along in the operation?

T 5689. Over objections from counsel, the judge responded:

> The inducement question here is a matter of law. It is not a problem you even have to worry about. It is there. The only question that you have to de-

> cide in order to answer the element of entrapment is was the defendant predisposed to commit the crime. You said from day one, or at some other time. *You have to decide when the crime was committed, if you get to that element, and then determine as of that time when he committed the crime was he predisposed to do it or wasn't he.* (Emphasis supplied.)

T 5699. The judge then repeated verbatim the lengthy entrapment charge previously given. T 5700-07. But the answer to the jury's specific question was firmly implanted in their minds, and they promptly determined that Senator Williams had committed the crimes charged and was at "that time" predisposed to do so.

The jury's question and the district court's precise response raise a fundamental question of federal law not previously decided by this Court. It is important that the Court resolve this issue now, for if the supplemental instruction is allowed to stand, then the entrapment defense firmly established by this Court will, in effect, be vitiated. After all, virtually all defendants are disposed to commit the crime charged at the time they actually do so.

The court of appeals clearly recognized the error in the district court's instruction when it stated that "[a]s a general proposition of law the fragment of the supplemental response now challenged by appellants was erroneous. A defendant's predisposition is not to be assessed 'as of that time when he committed the crime'." *United States* v. *Williams*, 705 F.2d at 618; App. 31a. According to the court of appeals "predisposition refers to the state of mind of a defendant before government agents make any suggestion [directly to a defendant] that he should commit a crime." *Id.* Since the court of appeals found that Senator Wiliams was first directly asked to obtain government contracts on May 31, 1979, five months after the Government's operation had been initiated, they looked only to that date in analyzing and finding predisposition.

The appellate court's interpretation of the law, like the supplemental instruction given by the district court, distorts both the meaning of predisposition and its function in the entrapment defense. Both interpretations of the law of predisposition by the courts below totally ignore the cumulative effects of escalating Government initiative and inducements occurring over a period of nearly five months from January through May of 1979—i.e., the Government's encouragement of the legitimate titanium venture, leading up to its agreement to finance that project, first, to the extent of $13 million, and then of $100 million, the injection of a criminal element into the legitimate business venture, and an entire course of conduct aimed at overcoming the hesitancy expressed by the Senator and his associates over the acceptance of this criminal idea. And the Second Circuit ignored these actions of inducement for the paradoxical reason that they came before instead of simultaneous with or after the direct criminal suggestion.

If either of the lower court interpretations of the law of predisposition is accepted, the universally condemned commercial practice of "bait and switch" becomes an accepted law enforcement technique. The Government can interpose itself into a legitimate transaction, carry it along for months, offer vast inducements to advance it, and then on its own motion, switch to a criminal proposal, relying on the atmosphere it has earlier created to ensure its acceptance, and none of those actions are of any relevance if a predisposition to accept has been developed by the time the crime is proposed. Such a result is inconsistent with the essential goal of the entrapment defense as set forth by this Court, that is, to keep the Government from manufacturing crime. *See Sherman* v. *United States*, 356 U.S. at 372; *Sorrells* v. *United States*, 287 U.S. at 448, 452.

To avoid the creation of crime, a majority of the Court in *Sorrells* v. *United States*, 287 U.S. at 442, held that illegal entrapment exists—

> when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.

The controlling question was "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of creative activity of its own officials." *Id.* at 451. That, of course is exactly this case. No one suggests to this day that the offense here was the product of the creative activity of Senator Williams and his friends. The criminal element here was created and introduced by the Government.[8]

Twenty-six years after *Sorrells*, in *Sherman* v. *United States*, 356 U.S. 369, a majority of this Court reaffirmed the commitment to the entrapment defense as it was defined by the Court in *Sorrells*. Neither case specifically discussed the precise time for determining predisposition. The Court's opinions, however, focus on the time when

---

[8] Even the district court judge recognized that the criminal suggestion came from the Government, when he said:

> I mean the government was there. They set it up. They requested that he guarantee the taking of the titanium contracts. They are in a sense trying to create the crime. They are setting him up quite obviously.
>
> . . .
>
> I mean it starts with the government, this particular event. Regardless of what other transaction he might have engaged in, this particular event would not have happened but for the government going to the extent it did.
>
> . . .
>
> Quite obviously, the government arranged this thing.

T 4714, 4715, 4717.

the Government agent first approached the defendant and began his efforts to induce commission of a crime. In *Sorrells*, for example, the Court commented upon the defendant's reputation as an industrious, law-abiding citizen before the agent lured him into committing the crime charged. 287 U.S. at 411. And in *Sherman*, the Court's focus on the time before inducement and not the time of the actual criminal suggestion, was evident in its statement that the Government's evidence was "insufficient to prove petitioner had a readiness to sell narcotics at the time Kalchinian [the informant] approached him." 356 U.S. at 376.

This emphasis on the defendant's state of mind prior to the intrusion of the Government is evident in what this Court referred to in *United States* v. *Russell*, 411 U.S. 423, 427 n.4, as the "standard entrapment instruction." This instruction, taken from Devitt and Blackmar, 1 FEDERAL JURY PRACTICE & INSTRUCTIONS § 13.09, p. 364 (3d ed. 1977), contains the following language:

> If, then, the jury should find beyond a reasonable doubt . . . that, *before anything at all occurred respecting the alleged offense involved in this case*, the defendant was ready and willing to commit crimes such as are charged in the indictment, whenever opportunity was afforded, and that government officers or their agents *did no more than offer the opportunity*, then the jury should find that the defendant is not a victim of entrapment. (Emphasis supplied.)

There is nothing in this jury instruction or in the case law which indicates that "anything at all" should be limited, as the Second Circuit suggests, to the ultimate suggestion of a crime. On the contrary, it must be given its plain and natural meaning, which includes any actions taken by the Government to interfere with the defendant's volitional processes and lead him into a criminal act. The district court should have instructed the jury to determine whether the defendant was predisposed to commit the crime charged before "anything at all" occurred respect-

ing the alleged offenses charged in this case. This charge would have directed their attention to "day one" of the long series of actions by the Government agents to lay the ground work for and eventually to induce the criminal act charged.

B. The Improper Supplemental Charge Warrants Reversal.

As the Second Circuit correctly decided, the supplemental instruction now challenged by petitioner is erroneous as a matter of law. *See United States* v. *Williams*, 705 F.2d at 618; App. 31a. Consequently, the verdict which crucially rested on this instruction should have been reversed if the instruction had a "substantial influence" upon the jury's determination. This standard for reversal in a criminal case was established by this Court in *Kotteakos* v. *United States*, 328 U.S. 750, 764-65, when it stated:

> If when all is said and done, the conviction is sure that the error did not influence the jury or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Any other approach would subvert the due process requirement that a criminal conviction must be based upon proof beyond a reasonable doubt.

In determining whether a supplemental instruction had the substantial influence required to mandate reversal,

an appellate court must keep in mind the special importance and impact of such a charge. The unique features of a supplemental charge were well summed up by the Second Circuit in the recent decision of *Arroyo* v. *Jones*, 685 F.2d 35, 39 (2d Cir. 1982):

> First, it will have been the most recent or among the most recent, bit of instruction they [the jury] will have heard, and will thus be freshest in their minds. Moreover, it will have been isolated from the other instructions they have heard, thus bringing it into the foreground of their thoughts. Because supplemental instructions are generally brief and are given during a break in the jury's deliberations, they will be received by the jurors with heightened alertness rather than with the normal attentiveness which may well flag from time to time during a lengthy initial charge. And most importantly, the supplemental charge will normally be accorded special emphasis by the jury because it will generally have been given in response to a question from the jury.

Because of the preeminence of the supplemental charge, particularly one related to a vital issue, the error is not cured by a repetition of a prior confusing and unilluminating abstract charge. *Id.*

The influence of the disputed supplemental charge was obvious here. The jury was unable to reach a decision on the predisposition question based solely upon the initial charge. Thus, the judge's direction to focus on the point in time when the crime was committed may well have been the determinative factor leading to the jury's rejection of the entrapment defense. While the jury apparently found Senator Williams predisposed on the day he committed the crime charged (and we do not know from the general verdict whether that day was May 31, 1979, June 28, 1979, or some later date), it is probable that the jury would have found a lack of predisposition to commit the crime charged on some earlier date. For example, if the jury found that the crime was committed

on May 31, 1979, as did the Second Circuit, they may have found Senator Williams nondisposed on March 23, 1979, when he first met with Government agents, and surely would have found him nondisposed on January 11, 1979, when the Government began its efforts to induce crime. Similarly, if the jury found that the crime was committed on June 28, 1979, when Senator Williams met the sheik, the poor quality of the May 31 tape and the audible statements by the Senator on that tape indicating an intent to disclose his interests in the mine, might have led to a finding that he was nondisposed on May 31, 1979, March 23, 1979, or January 11, 1979.

The court of appeals found the erroneous instruction harmless, in essence, because available evidence would have permitted the jury to find that Senator Williams accepted the criminal opportunity when it was first presented on May 31, 1979. *United States* v. *Williams*, 705 F.2d at 609, 619; App. 10a, 33a-34a, 39a. But, as the Court stated in *Kotteakos*, the mere fact that there is enough evidence to support the jury's result if a correct interpretation of the law is applied is not enough to prevent reversal by an appellate court.[9] *Kotteakos* v. *United States*, 328 U.S. at 764. Reversal is unnecessary only when the error did not influence the jury or had only a slight effect. *Id.* Since the erroneous supplemental instruction challenged here undoubtedly had a "substantial influence" on the criminal conviction, reversal with directions as to a correct charge is required.

---

[9] The Second Circuit also suggested that the improper supplemental charge did not require reversal because the objection was not properly preserved for review. However, trial counsel indicated his opposition to the supplemental charge before it was given when he stated that "The government has to prove predisposition from day one. In other words, from on or about the first day of January, 1979 these two men were predisposed beyond a reasonable doubt." T 5685-86. In addition, after the charge, counsel asked that all prior objections be incorporated by reference. T 5708. Since the district court had, throughout the trial, relieved counsel

II. THE ACTIONS OF THE GOVERNMENT WERE SO OUTRAGEOUS THAT THEY AMOUNT TO A DENIAL OF DUE PROCESS OF LAW.

A. The Lower Federal Courts Have Been Unable to Define the Government Conduct Prohibited by the Outrageousness/Due Process Defense.

In *United States* v. *Russell*, 411 U.S. 423, the third significant entrapment case presented to this Court, the Court recognized that entrapment was not the only defense available to a defendant when the Government played a significant role in the creation of the crime charged. Although the Court in that case rejected the defendant's claim that he was entrapped as a matter of law because the Government agent had supplied him with a scarce ingredient essential to the manufacture of a controlled substance, *id.* at 427, it noted that:

> We may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.

Id. at 431-32. The continued viability of this outrageousness/due process defense was confirmed several years later in *Hampton* v. *United States*, 425 U.S. 484. In *Hampton*, a majority of the Court found that the Government role in the creation of crime exceeded the proper limits in the "rare" case where Government overinvolvement in the crime reached "a demonstrable level of outrageousness." *Id.* at 494 & n.7. The Court did not attempt in either case, however, to explain more specifically the parameters of this due process defense.

---

of restating objections already made, presentation of the specific objection after the instruction was read was unnecessary.

Moreover, if the instruction was plain error, as the appellate court recognized, then failure to object would not, by itself, stand in the way of reversal. *Kotteakos* v. *United States*, 328 U.S. at 765.

This lack of guidance from this Court has made most lower federal courts reluctant to prohibit any Government conduct, no matter how extreme, so long as it is purportedly aimed at the detection of crime. In fact, of the dozens of cases raising this due process issue, we are aware of only two reported cases, *United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978), and *United States* v. *Batres-Santolino*, 521 F. Supp. 744 (N.D. Cal. 1981), where the due process defense has been sustained. Moreover, in the existing void, the courts have produced a number of vague and inconsistent decisions.

These problems are amply illustrated by the various Abscam-related cases. One district court judge, who presided at the trials of five Congressmen, has consistently found the Government conduct to be within acceptable bounds. *See, e.g., United States* v. *Williams*, 529 F. Supp. 1085 (E.D.N.Y. 1981), App. B; *United States* v. *Myers*, 527 F. Supp. 1206 (E.D.N.Y. 1981) (Judge Pratt). Two other district court judges who heard Abscam cases, however, found the conduct of the Government to be outrageous. *See United States* v. *Kelly*, 539 F. Supp 363 (D.D.C. 1982) (Judge Bryant); *United States* v. *Jannotti*, 501 F. Supp. 1182 (E.D. Pa. 1981) (Judge Fullam).[10] One of those judges was reversed by an appellate court which acknowledged that a "delineation of the conduct circumscribed by the due process defense is, at best,

---

[10] The confusion among district judges is further shown by the charge in the case of *United States* v. *Buckalew*, which is set forth in Devitt and Blackmar, 1 FEDERAL JURY PRACTICE & INSTRUCTIONS 372-73 (3d ed. 1977). The judge there charged the jury that "outrageousness" was a matter to be determined by the jury. He stated: ". . . you must determine whether these acts, as you find them, reach an intolerable degree of over-reaching governmental participation." He further charged that "if the governmental activities reached the point that I have just defined in your minds, then the predisposition of any defendant would not matter." On the basis of this charge, the jury found the defendants not guilty of the offense of breaking into and entering a Selective Service Board office in Camden, New Jersey.

elusive." *United States* v. *Jannotti*, 673 F.2d 578, 606 (3d Cir. 1982). The other judge was reversed by an appellate court which limited the due process guarantee to "coercion, violence, or brutality to the person," [11] but indicated dissatisfaction with such a narrow interpretation and asked this Court to elaborate further on the outrageousness defense. *See United States* v. *Kelly*, 707 F.2d 1460, 1474, 1476 (opinion of Ginsburg, J.) (D.C. Cir. 1983). In the present case, the Second Circuit rejected Senator Williams' due process claims, but at the same time admitted that it did "not know what sort of circumstances the Court believes would meet this elusive standard." *United States* v. *Williams*, 705 F.2d at 619; App. 35a.

The uncertainty thus expressed by three appellate courts concerning the proper limits of the outrageousness/due process defense points out the need for guidance from this Court on this important constitutional issue. Without such guidance, lower courts will continue in their reluctance to condemn any type of Government involvement in the creation of crime, and the limits of what is or is not outrageous Government conduct will in fact be determined by the self-interest and imagination of Government operatives and paid informants. The due process defense established by this Court on two separate occasions requires definition here or it will be rendered meaningless.

---

[11] Other courts have not found any similar constraints in this Court's pronouncements. *See, e.g., United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978); *United States* v. *Batres-Santolino*, 521 F. Supp. 744 (N.D. Cal. 1981). Physical coercion and duress are already prohibited by other narrowly-defined defenses. Moreover, this Court has recognized in a number of cases that prohibited official compulsion can be mental as well as physical. *See, e.g., Brewer* v. *Williams*, 430 U.S. 387; *Miranda* v. *Arizona*, 384 U.S. 436; *Spano* v. *New York*, 360 U.S. 315. Indeed, sophisticated psychological stratagems (including peer pressure) designed to push an individual into taking a desired course of action are often harder to resist than more obvious forms of coercion, since they are subtle, cumulative, and difficult to detect.

B. The Due Process Limits on Government Conduct in a Bribery Investigation Should Be No Broader Than Those Established by the Department of Justice and the F.B.I. to Ensure the Fairness of the Abscam Operation.

While the essential nature of due process makes it difficult to fashion a rule applicable to all circumstances, it does not preclude the formulation of general guidelines applicable to categories of undercover investigations. We suggest that the outer limits of due process in a bribery case should be no wider than the three safeguards adopted by the Department of Justice to implement the Attorney General's Guidelines on the Use of Informants in Criminal Investigations ("Levi Guidelines") in the context of the Abscam operation. DP Ex. 6 & 110. Those Guidelines were established to ensure that "each undercover operation is carried out in a manner which is fair, unambiguous, productive of successful prosecutions, and which minimizes the impact on or even the involvement with innocent persons." DP Ex. 110, at 138. Moreover, officials heading the agency viewed the safeguards as "essential" to the fair conduct of an investigation. *Id.* at 152. Thus, failure to adhere to those Guidelines is a strong indication that the Government conduct does not meet due process requirements of essential fairness, that it is indeed outrageous, and that it should not be tolerated by any court.[12]

Those safeguards, which were not applied in the present case, are as follows. First, undercover techniques such as those used in Abscam may be used only "when we [the Government] reasonably suspect that criminal activity of a given type or pattern is occurring or is likely to occur." DP Ex. 110, at 152. Accordingly, when the Government makes the first move it conducts "a care-

[12] As Solicitor General Thatcher said in his brief for the Government (p. 13) in the *Sorrells* case: ". . . the courts are the constituted agencies for the protection of the individual against the misuse of authority."

ful evaluation of anything we are told by intermediaries about the possible interest of other persons in a criminal transaction, and an attempt to check such claims to the extent practicable." *Id.* at 139. Second, where prior assurances of criminality are not possible, the F.B.I. "make[s] clear and unambiguous to all concerned the illegal nature of any opportunity used as a decoy." *Id.* at 139, 170. In other words, the F.B.I. structures the operation so that it is self-selective—i.e., so that anyone who meets with Government agents has selected himself for criminal activity. *Id.* at 153. Finally, under the guidelines, F.B.I. undercover operations are modeled "on the real world" as closely as possible. DP Ex. 110, at 140. "[I]nducements or promises or attractiveness that the real world doesn't offer" are not offered in the context of an undercover operation. *Id.* at 154.

Of course, instances of Government misconduct in addition to the failure to abide by the standards explained above, would provide further confirmation of the outrageousness of the Government conduct in a particular case.

C. The Government's Conduct During Its Investigation of Senator Williams Was Outrageous.

A review of the Government's conduct in the present case reveals that the Government violated each of the three safeguards established by the F.B.I. to ensure a fair investigation. A thorough review also shows a course of Government activity that reeks of impropriety.

First, the Government admittedly had no prior reason to believe that Senator Williams was involved in criminal activity of a given type or pattern. DP 413, 415, 778. Moreover, they did not make any attempt to evaluate either the mining venture or the persons connected with it before scheduling a meeting with the Senator's associates. *See, e.g.*, DP 369-72. In fact, the go-ahead for this investigation was given so quickly—within hours of the time that the Senator's name was mentioned—

that it was not humanly possible for the Government adequately to check out this lead. And there was, in fact, nothing illegitimate about the mining venture and its need for capital.

Nor did the Government, in the absence of prior criminality, make clear the illegal nature of the financing being offered. Errichetti was not told that the sheik was interested only in financing corrupt business ventures, and the Senator's friends were not told, until several months into the "investigation," that active participation by the Senator was sought in connection with the financing. Similarly, Senator Williams was denied the opportunity to select himself for a criminal act since he had no reason to think that the Abdul representatives were engaging only in shady deals. In fact, he selected himself and his friends for an apparently legitimate opportunity to obtain financing for what, as far as he knew (and apart from the Government's deliberate deception), was a legitimate business proposal. *See* DP 894. Since self-selection is effective only if a person knows what he is selecting himself for, the mechanism here failed of its essential purpose. DP Ex. 110, at 153.

Finally, the opportunities presented to the Senator did not mirror the real world. The real world does not offer $100,000,000 loans for business ventures previously unable to obtain even $12-13 million to get them operational. Nor does the real world offer $70 million profits that can be made simultaneously with the receipt of the loan. More importantly, the real world does not grant a person such exorbitant financial rewards simply for making a representation that he is told need never be acted upon.

The entire course of Government conduct here also confirms the impropriety of the Government's actions.[13]

---

[13] There are many other facts in this record showing extraordinary Government impropriety. While it is not possible to state them all at length in this petition, two examples are—

1. The Government arranged with the Chase Manhattan Bank that it would tell persons inquiring about the "sheik"

The Government utilized the services of a known and convicted confidence man.[14] It promoted deception through the use of F.B.I. agents who falsely represented that they were agents of a non-existent sheik. These agents utilized a government plane to take Senator Williams' associates to inspect the mine. They introduced Senator Williams to the supposed sheik on a "yacht" in Florida. They proposed financing of $100,000,000 to cover the acquisition of the American Cyanamid processing plant, the titanium mine, and working capital. And all of this was done by the Government over a period of nearly five months before they ever made a "corrupt proposal" to Senator Williams. Indeed, one may fairly wonder: Who was conspiring prior to May 31, 1979? Was it Senator Williams and his friends, or was it the many Government officers and agents who converted a legitimate business inquiry into a criminal scheme and fabricated the government contracts plot?

Nor did the Government stop after the direct suggestion of the criminal proposal. Government agents assured the Senator and his associates that he would never have to engage in any illegal acts. They "coached" him for a meeting with the sheik. They pressured the Senator's friends to act as unwitting Government agents. And they presented increasingly more devious and enticing

---

that he was a depositor, with a balance of many millions of dollars. *United States* v. *Jannotti*, 501 F. Supp. 1182, 1193 (E.D. Pa. 1980); *see* T 817.

2. As a part of an effort to produce evidence that Senator Williams would get government contracts, Errichetti forged a letter with Senator Williams' signature on Senate stationery. Ex. WD (Sen. Comm. Print, Pt. 6, pp. 435-41). This was done with the knowledge of Anthony Amoroso, one of the Government agents. *Id.* Although the letter was not used, Senator Williams was not notified, and Errichetti was not prosecuted for this crime.

[14] Judge Sloviter, in *United States* v. *Jannotti*, 673 F.2d 578, 581 (3d Cir. 1982), called him a "career swindler."

criminal schemes in order to trap the Senator in a clearly illegal act. This *is* a case "where the defendants had no prior criminal involvement, and were not about to embark on any criminal activities when the government agents induced them to become involved in" criminal conduct.[15]

The real issue on the merits of this case is not the conduct of Senator Williams. Without the Government's actions, the Senator would never have thought of committing the crimes charged. He would still be the distinguished public servant that he had been for most of his adult life. Thus, it is the Government's year-long effort to destroy his long career of public service that is the proper focus here. And when that effort is analyzed, it is clear that the Government's conduct is outrageous and should not receive the blessing of this Court.

III. UNDER THE CIRCUMSTANCES OF THIS CASE, INCLUDING THE ABSENCE OF A PREDICATE, THE EXTENSIVE ELECTRONIC SURVEILLANCE, WITHOUT A WARRANT, WAS A VIOLATION OF THE FOURTH AMENDMENT.

At the outset of this case, without any reason to suspect particular criminal conduct to appear, the Government subjected Senator Williams and his associates to extensive audio and video surveillance. They justified this conduct on the ground that these recordings were "consensual tapes," that is, that the consent of the Government agent to electronic surveillance of each conversation removed it from the protection otherwise afforded by the Fourth Amendment.

The Government's argument is, of course, derived from this Court's decision in *United States* v. *White*, 401 U.S. 745, which sustained consensual governmental surveillance on the facts of that case. But the *White* decision is a slim reed, at best considered dictum, since a majority

[15] Devitt, J., in *United States* v. *Marcello*, 537 F. Supp. 402, 408 (C.D. Calif. 1982), distinguishing that case from *Batres-Santalino*, *supra*.

of the Court agreed that the result was determined by this Court's decision in *Desist* v. *United States*, 394 U.S. 244, which held that *Katz* v. *United States*, 389 U.S. 347, should not be applied retroactively. Only four members of the Court—Chief Justice Burger, and Justices White, Stewart, and Blackmun—concurred in the decision on the merits. Justice Black concurred in the result on the basis of his dissenting opinion in the *Katz* case, 389 U.S. at 364, which rested on his view that the Fourth Amendment does not apply to electronic surveillance; and Justice Brennan concurred in the result only on the basis of the *Desist* case, making it clear that he agreed with the dissenters but would "go further." *United States* v. *White*, 401 U.S. at 765. Justices Douglas, Harlan and Marshall dissented.

The dissenting opinion of Justice Harlan in *White*, 401 U.S. at 768-95, is particularly trenchant. He pointed out that, when "recent Fourth Amendment decisions . . . are read" with others he discussed, "the primacy of an additional general principle becomes equally evident: official investigatory action that impinges on privacy must typically, in order to be constitutionally permissible, be subjected to the warrant requirement." *Id.* at 781. He referred particularly to this Court's decision in *Terry* v. *Ohio*, 392 U.S. 1, where the Court held, in his words, "that any restraint of the person, however brief and however labeled, was subject to a reasonableness examination." *United States* v. *White*, 401 U.S. at 784. He continued:

> The impact of the practice of third-party bugging, must, I think, be considered such as to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society. . . .
>
> Were third party bugging a prevalent practice, it might well smother that spontaneity—reflected in frivolous, impetuous, sacreligious, and defiant discourse—that liberates daily life. . . . All these values are sacrificed by a rule of law that permits official

> monitoring of private discourse limited only by the need to locate a willing assistant.

Id. at 787-89. And he concluded that a warrant rule—

> would not end electronic surveillance. It would prevent public officials from engaging in that practice unless they first had probable cause to suspect an individual of involvement in illegal activities and had tested their version of the facts before a detached judicial officer.

Id. at 789-90.

In view of the fact that the *White* case is so widely and freely used even though it has never commanded a majority of this Court on the merits, it is appropriate that the Court should now reexamine the issue. Moreover, it is particularly appropriate that the issue should be reviewed in this important case where it is squarely presented on the facts, and where the facts are very different from those involved in *White*.

In *White*, the Government listened in on conversations occurring over a several-week period, forecasting actual deliveries or payments for narcotics. The Government expected on each occasion to obtain evidence of a narcotics violation, and indeed, the surveillance was narrowly circumscribed so as to obtain evidence of those crimes. Moreover, the electronic surveillance in cases relied upon by this Court in *White* (*On Lee* v. *United States*, 343 U.S. 747, and *Lopez* v. *United States*, 373 U.S. 427) was similarly focused on a limited number of discussions of specific crimes.

It is a far cry from those situations to the present case where hundreds of hours of tapes were made in many locations over nearly a year, many of them made before there was any intimation of criminal conduct. Moreover, the recordings were not made to obtain evidence of specific ongoing criminal conduct. On the contrary, the seizures here were wholesale, clearly part of a "fishing expedition" led by a creative con-man for the purpose of recording situations where Senator Williams and his associates might be pressured either into im-

proper conduct or the appearance of improper conduct. This is just the sort of situation where the warrant rule could well serve its constitutional purpose. The question is inherent in the nature of the case, and should receive this Court's review.[16]

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

ERWIN N. GRISWOLD
Counsel of Record
CLAIRE L. SHAPIRO
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 861-3898

GEORGE J. KOELZER
JOEL N. KREIZMAN
EVANS, KOELZER, OSBORNE, KREIZMAN & BASSLER
P. O. Box BB
Red Bank, New Jersey 07701
Counsel for Petitioner

August, 1983

---

[16] It is true that this contention was not specifically raised prior to trial in this case, as required by Rule 12 of the Federal Rules of Criminal Procedure. This Court may nevertheless consider the issue "for cause shown." Fed. R. Crim. P. 12(f).

Senator Williams is not making a routine Fourth Amendment suppression argument. On the contrary, he is suggesting that the extensive and long-continued surveillance occurring in the present "investigation," initiated without any prior reason to expect particular criminal conduct to occur, is far too broad and sweeping to be covered by this Court's narrowly divided decision in the *White* case. Moreover, this question was an integral part of the due process argument which was expressly reserved by the trial court for post-trial decision.

83-256

Office - Supreme Court, U.S.
FILED
AUG 17 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

HARRISON A. WILLIAMS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ERWIN N. GRISWOLD
Counsel of Record
CLAIRE L. SHAPIRO
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 861-3898

GEORGE J. KOELZER
JOEL N. KREIZMAN
EVANS, KOELZER, OSBORNE,
KREIZMAN & BASSLER
P. O. Box BB
Red Bank, New Jersey 07701

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

		Page
A.	Opinion of United States Court of Appeals for the Second Circuit	1a
B.	Opinion of United States District Court for the Eastern District of New York	46a
C.	Judgment of United States Court of Appeals for the Second Circuit	88a
D.	Order of United States Court of Appeals for the Second Circuit Denying Petition for Rehearing	90a
E.	Entrapment Charge Given by the United States District Court for the Eastern District of New York	92a

APPENDIX A

Opinion of the Court of Appeals
705 F.2d 603 (2d Cir. 1983)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 168, 424—August Term, 1982

(Argued October 7, 1982 Decided April 5, 1983)

Docket Nos. 82-1111, 82-1123

UNITED STATES OF AMERICA,

Appellee,

—v.—

HARRISON A. WILLIAMS, JR. and ALEXANDER FEINBERG,

Defendants-Appellants.

Before:

FRIENDLY, NEWMAN, and KEARSE,
Circuit Judges.

Appeal from judgments of conviction entered in the District Court for the Eastern District of New York (George C. Pratt, Judge), after a jury trial at which a former United States Senator and his associate were

found guilty of bribery and related offenses arising out of the Abscam investigation.

Affirmed.

ERWIN N. GRISWOLD, Washington, D.C., and George J. Koelzer, New York, N.Y. (Claire L. Shapiro and Jones, Day, Reavis & Pogue, Washington, D.C., and Joel N. Kreizman, John P. Croake, and Evans, Koelzer, Marriott, Osborne & Kreizman, New York, N.Y., on the briefs), *for defendant-appellant Williams.*

CAROL PRENDERGAST, New York, N.Y. (Harry C. Batchelder, Jr., Susan D. Bauer, Glenn Bogdonoff, and Shelly R. Rossoff, New York, N.Y., on the brief), *for defendant-appellant Feinberg.*

NEWMAN, *Circuit Judge*:

Harrison A. Williams, Jr., formerly United States Senator from New Jersey, and Alexander Feinberg, an attorney and close friend of Williams, appeal from judgments of conviction entered in the District Court for the Eastern District of New York (George C. Pratt, Judge) after a jury trial on bribery and related charges arising out of the Abscam undercover "sting" operation. We have previously explored the factual background of Ab-

scam and many of the legal issues arising from this controversial undertaking in upholding the sufficiency of the indictments against four Congressmen and three of their associates, *United States v. Myers*, 635 F.2d 932 (2d Cir.) (*Myers I*), *cert. denied*, 449 U.S. 956 (1980); *United States v. Murphy*, 642 F.2d 699 (2d Cir. 1980), and in affirming their convictions, *United States v. Myers*, 692 F.2d 823 (2d Cir. 1982) (*Myers II*), *petitions for cert. filed*, 51 U.S.L.W. 3554, 3555, 3567 (U.S. Jan. 14, 17, 1983) (Nos. 82-1183, -1199, -1255). The evidence against Williams and Feinberg differs in significant respects from that presented in previous Abscam trials, but the major legal issues are similar. In light of our holdings in *Myers I* and *Myers II* and for the more particular reasons detailed in this opinion, we affirm the judgments of conviction.

I.

Williams and Feinberg were charged in a nine-count indictment, along with co-defendants Angelo J. Errichetti, formerly Mayor of Camden, New Jersey, and George Katz, a New Jersey businessman.[1] Errichetti was severed after his conviction in the *Myers* trial, and Katz was severed for health reasons and has since died. The indictment alleged a conspiracy and eight substantive violations, arising out of Williams' conduct, aided and abetted by Feinberg, in promising to use his position as a United States Senator to help obtain government contracts for the purchase of titanium from a mining venture in which the defendants held an interest. The promises were alleged to have been made in connection with two

---

1 We have previously rejected pretrial challenges to the indictment. *United States v. Williams*, 644 F.2d 950 (2d Cir. 1981).

transactions, the first, a proposed loan of $100 million ostensibly to have been financed by a fictitious entity known as Abdul Enterprises, Ltd. This entity, purporting to be an enterprise of two wealthy Arab sheiks, was the cover of an elaborate "sting" operation conducted by agents of the Federal Bureau of Investigation. *See Myers II*, *supra*, 692 F.2d at 829-30. The second transaction, also proposed by the Abscam operatives, involved a second Arab group's offer to purchase the mining venture for a sum that would have yielded all the owners of the venture an estimated $70 million profit. For each transaction the indictment charged four offenses: bribery, in violation of 18 U.S.C. § 201(c) (1976) (Counts Two and Six); receipt of an unlawful gratuity, in violation of 18 U.S.C. § 201(g) (Counts Three and Seven); conflict of interest, in violation of 18 U.S.C. § 203(a) (Counts Four and Eight); and interstate travel to carry on the unlawful activity of bribery, in violation of 18 U.S.C. § 1952 (Counts Five and Nine).[2] Count One charged a conspiracy to defraud the United States and to commit the substantive bribery, unlawful gratuity, and conflict-of-interest offenses, in violation of 18 U.S.C. § 371.

A jury trial began on March 30, 1981, and concluded on May 1, 1981. The jury found both defendants guilty on all nine counts. From June 22 to June 25, 1981, the District Court conducted a "due process" hearing to assess various post-trial claims, including the defendants' basic contention that the Government's conduct of the Abscam investigation exceeded the standard of fairness

---

2 Counts Two through Four alleged that Senator Williams sought and agreed to receive a loan of money for a business enterprise in which he had an interest and sought and agreed to receive shares of stock in the enterprise. Count Five referred only to the shares of stock. Counts Six through Nine alleged that Senator Williams sought and agreed to receive a sum of money as proceeds from the sale of the enterprise.

mandated by the Due Process Clause of the Fifth Amendment. On December 22, 1981, Judge Pratt issued a comprehensive opinion rejecting all of the defendants' claims, except Feinberg's motion for judgment of acquittal on Count Five for insufficiency of the evidence, which was granted. *United States v. Williams*, 529 F. Supp. 1085 (E.D.N.Y. 1981). Thereafter Judge Pratt sentenced Williams to three years' imprisonment and fines totalling $50,000; Feinberg received a sentence of three years' imprisonment and fines totalling $40,000.

II.

The Government's evidence against Williams and Feinberg revealed transactions more elaborate than those of the Congressmen in *Myers* who accepted $50,000 in cash in exchange for their promises to help secure private immigration legislation. Despite the complexity and higher stakes, however, the essentials of the criminal conduct in this case remained straightforward: a public official's seeking monetary benefit in exchange for his promise to use his official position.

The background events were recounted by Henry A. ("Sandy") Williams, III, a friend and business associate of Senator Williams but not a relative, who testified for the Government after receiving a grant of immunity. In 1975 Sandy Williams became aware of a mining property in Piney River, Virginia. The property was initially thought to be rich in phosphorus and, later, in titanium. Sandy Williams acquired an option on the property for Penque Williams, Inc., a corporation owned equally by him and an associate. Upon acquiring the option in 1975, Sandy Williams discussed the property with Senator Williams and told him that considerable help would be

needed to get the venture started. The Senator assured Sandy Williams that he would "give us all the help that he could possibly give us" and, as Sandy Williams further testified, "for that we agreed that he would get one half of my interest in Penque Williams, Inc." In 1976 Sandy Williams obtained enough financing to exercise the option on the Piney River property and formed a new corporation, United States Titanium Corporation, to take title to the property. Sandy Williams held a 28-1/3% interest in the new corporation, and on March 23, he executed a document acknowledging that half of his interest (approximately 14%) was owned by the Senator. The Senator retained the document in his Senate office files.[3] For three years nothing happened, since the mining venture lacked the necessary capital, estimated by Sandy Williams to be $13 million. Enter Abdul Enterprises, Ltd., the fictitious entity created by the Federal Bureau of Investigation as a source of funds ostensibly supplied by two Arab sheiks looking for investment opportunities.

The Loan Transaction

As the *Myers* case reveals, one of the first politicians to become interested in the prospect of obtaining money from Abdul Enterprises was Angelo Errichetti, then the Mayor of Camden, New Jersey, and a member of the New Jersey Senate. In January 1979, Errichetti mentioned to his friend Senator Williams that he had established con-

---

3 At trial the Senator sought to dispel the significance of the 1976 document. Though the point is irrelevant in view of the Senator's 1979 receipt of stock certificates evidencing his share of the venture, we note that in a recorded conversation on September 11, 1979, when the tax consequences of a sale of the venture were discussed, the Senator stated, "We can put our investment back to the beginning of Piney River for the capital gains," a date Sandy Williams reminded the Senator was 1976.

tact with wealthy Arab investors. Williams' reaction was to tell his long-time friend and associate, attorney Alexander Feinberg, to contact Errichetti and "see what the hell's going on." By this time Feinberg had acquired a percentage of the mining venture in return for his looking after the Senator's interests and helping to make presentations to potential investors. Feinberg, Errichetti, and Sandy Williams met with an FBI agent and an FBI informant, Melvin Weinberg, both posing as representatives of one of the sheiks. Feinberg stated that Senator Williams was interested in the mining project and was anxious to have it funded. He also made it clear that the Senator had an undisclosed interest in the venture, which he said was half of Feinberg's share. As Errichetti described the relationship to the sheik's representatives, Feinberg was the Senator's "bagman." Sandy Williams said that $13 million was needed to get the mining venture into operation. In early March, Sandy Williams suggested to the sheik's representatives that Abdul Enterprises loan an additional $70 million to finance the purchase of a titanium dioxide plant owned by the American Cyanamid Company. He estimated the total financing needs were $100 million.

On March 21, 1979, Sandy Williams discussed with the Senator a meeting the Senator was scheduled to have with the sheik two days later on board a yacht in Florida. Sandy Williams testified that he told the Senator, "Pete [the Senator's nickname], this is an important meeting," to which the Senator replied, "Sandy, look, I will do everything possible to get that money." At a party aboard the yacht on March 23, the Senator met the sheik and told one of the sheik's representatives that he was interested in having the mine funded and would "assist [the representative] in any way possible in getting this project going."

The next day Errichetti reported to the sheiks' representatives how impressed the Senator had been and that he "can be of service to you in Washington or wherever. This is Government stuff, now."

The opportunity for such service appears to have initially come to the attention of Sandy Williams and George Katz, another friend of the Senator's and also a participant in the mining venture, as a result of newspaper articles in late May outlining the need for titanium for national defense, especially its use in submarines. Katz telephoned Weinberg, read him one of the articles, and estimated that the venture could market forty thousand tons a year "[i]f you go into a titanium metal which the United States is short of." In discussing the articles with Sandy Williams, Katz raised the prospect of the Senator's helping to secure government contracts for titanium. Sandy Williams testified that Katz told him, "Sandy, this deal, if it was going to be made, the senator is going to have to exert himself, is going to have to try to get the government contracts for this project." Sandy Williams responded that the Senator could not get government contracts for the project because, as he understood it, contracts in excess of $25,000 were awarded strictly on the basis of competitive bidding. Sandy Williams further testified that later that same day Katz told him competitive bidding was not required:

> He said, you are all wrong about bidding on a government contract. You can negotiate, he said, a contract with the government, if it is a scarce item, if it is an item the government needs, you don't have to bid on it.
>
> And I didn't argue with him because George was in the garbage business in New Jersey and he was

> dealing in government contracts and I took what he said to be true.

On May 30, Weinberg asked Feinberg in a recorded conversation whether the Senator can "do something on getting us the contracts." Feinberg replied, "We can try." The next day the sheik's representatives held a luncheon meeting with the Senator at the Pierre Hotel in New York City. Just before the luncheon, Feinberg told Weinberg in a recorded conversation,

> On the contracts, I can tell you now that he will open up the doors for us. And use his, you know what I'm talking about, to get the contracts.

Moments later Feinberg met with Weinberg and F.B.I. agent Anthony Amoroso, one of the principal undercover operatives. Their recorded conversation included the following:

> Amoroso: Is [the Senator] going to be able to steer any kind of contracts from the Committees that he's on toward, toward the operation that we're going to get involved with? I mean [—]
>
> Feinberg: Well this I didn't know until now I have to ask him that.
>
> Amoroso: Yeah.
>
> Feinberg: I would assume, I know that he's often opened up many doors. You understand what I'm talking about, and with his blessing [—]

Also prior to the luncheon, the Senator met with Feinberg and Sandy Williams. At this meeting, according to the

testimony of Sandy Williams, Feinberg told the Senator, "Pete, the important thing [a]bout this meeting is going to be your help in getting government contracts," and the Senator replied, "I understand."

At the luncheon meeting, when, the Government contends, the subject of getting government contracts arose, the Senator stated, "I can't say yes or no, sure try." The audio tape of this meeting is inaudible as to the conversation preceding the Senator's remark, but other evidence abundantly permitted the jury to conclude that the Senator was referring to his role in obtaining government contracts. First, the conversations just prior to the luncheon indicate that the Senator understood his role. Second, Amoroso, who attended the luncheon, testified that the Senator's willingness to "try" was expressed in response to a statement that the Senator's aid in obtaining government contracts was one of the reasons for the loan. Third, after the meeting, both Feinberg and Sandy Williams reminded the sheik's representatives that the Senator had said he would try to get government contracts.[4]

---

[4] A taped telephone conversation on June 8 included this exchange between Feinberg and Weinberg:

Weinberg: All Yassir [the sheik] wants to know is that he's gonna get contracts.

Feinberg: Well he can't gu—he's gonna help us, he's already said that.

. . . .

You heard him say it, didn't you?

. . . .

Weinberg: Yeah, I heard him say it.

Both Feinberg and Weinberg had attended the May 31 luncheon. At a June 15 meeting, also recorded, this exchange occurred:

Feinberg: I talked to the Senator before in New York. I said these people and everybody understands that you have to help us get these contracts. He said of course I will. Isn't that right?

Sandy Williams: Definitely, I was right there.

With the Senator and his cohort having expressed an eagerness to receive from Abdul Enterprises loans totaling nearly $100 million, the Senator met with the sheik on June 28 to persuade him that the Senator's influence justified making the loans. The videotaped conversation reveals Williams discussing at length his ability to be influential with the Government as a result of his senior position in the Senate. In addition to mentioning his close relationship with the Vice-President ("used to work for me, on the committee") and the Secretary of State ("a neighbor back in New Jersey. . . we're very close"), the Senator assured the sheik:

> I only involve myself in something that I, I just completely believe in and this one, this whole situation we've presented through the mine, the processing and the product. I believe it, you know. With . . . great pleasure talk to the President of the United States about it and, you know, in a personal way and get him as enthusiastic and excited because we know what our country needs.

Government contracts were explicitly mentioned:

> Williams: We've got thirty thousand tons we could produce a year. Therefore, with what we got of this value, knowing the need of our country, being here in a position to go to ah well, you know, right to the top on this one.
>
> . . . .
>
> And we've got a combination here, we're a couple of Senators and . . . when we work together, Senator Errichetti and I, it works.
>
> . . . .

Amoroso: [The sheik] feels that with you behind this thing, with the people that you know, the ah government contracts, available, you know, this whole thing—

Williams: Right through.

. . . .

Amoroso: . . . [T]his is why I wanted you to meet with the sheik and he wanted to meet with you because I think without you . . . he would've felt it was just another business deal.

Errichetti: Well, without the Senator, there is no—forget it. There's no, no mines or nothing. In fact, the Senator, Pete had the opportunity wherewithall and the know-how in his position as the United States Senator. . . .

Williams: Yes, I, I've been here decades and, uh, in that position you come up to those positions and you work with the people that make the decisions.

. . . .

Amoroso: Well, then, there—in that respect, then, with you being in that position and contracts and, uh, the like would not be a problem.

Williams: No problem. No. In a situation where we can just sit around and describe, they'll see, it will come to pass.

. . . .

Amoroso: Well, that, like we discussed, ah that end of it is really, uh, not our concern, it's none of our business, who you go to—

Williams: Yeah.

Amoroso: —you know, to do—

Williams: But you can be assured that we, we—

Amoroso: —the manipulation behind the behind the scenes.

Williams: —we have a relationship that will make all of that possible. That's that's all I want to tell you now.

The conversation also revealed the Senator's reason for being helpful and the means for receiving his financial reward:

Williams: I'm not gonna be in this situation forever and I want to have a you know foundations which give me that independence when I, later time.

Amoroso: Alright. Well, then we're agreed on the—I just wanted, uh, for you to tell us who you wanted to have it in—

Williams: Alex.

Amoroso: —so that we're gonna put your shares in Alex's name—

Williams: Alex.

Amoroso: —and he will control them and I think ah he's gonna actually sign them and then, if you want, you can maintain possession of them.

Errichetti: [Inaudible] as he sees fit.

Williams: That's the way to do it. Yeah.

On August 5, at a meeting at a restaurant at John F. Kennedy Airport, the Senator accepted stock certificates representing an 18% share in three corporations Feinberg had formed to carry out the mining venture. As previously agreed, the certificates had been issued to Feinberg, who then endorsed them in blank. In the recorded conversation of the meeting, Williams acknowledged his understanding of the arrangement:

Amoroso: [T]hese are the certificates and I had Alex endorse them . . . .

. . . .

Williams: And he just endorsed these over then.

Amoroso: Yeah.

Williams: In blank.

Weinberg: Right.

Williams: Very good.

Weinberg: So they're blank you can leave them blank and when you want to put your name in it you can put your name in it.

The Purchase Transaction

At the August 5 meeting, the sheik's representatives broached the possibility that a second group of Arabs might be willing to pay millions of dollars for an outright purchase of the mining venture. On August 27 Katz and Sandy Williams met with the Senator to compare this second opportunity to the first approach of obtaining only loans. According to Sandy Williams' testimony, Katz

told the Senator that, as part of the sale, he would have to "stay . . . with the same kind of arrangement . . . and he [help?] get government contracts [for the new owners]." The Senator replied, "We'll go the second way." Sandy Williams also testified that on September 4, Feinberg told the Senator that the "same things that he promised Yassir . . . he would do for the second group," and the Senator said that he would.

The principals in the mining venture met with the Senator on September 11 to decide whether to sell their interests to the second group of Arabs for a sum estimated by Sandy Williams to produce a profit for the group of $70 million. The meeting was videotaped. Under the proposal Sandy Williams was to be employed by the new group to run the venture, and he would be the person to contact the Senator. The Senator's role was spelled out by Weinberg:

> The whole thing on this sale depends [on] you and the government getting the contracts for us cause the whole thing depends upon it. You're the one that's gotta give us the O.K. to do it. If you have any qualms about it, you wanna keep it the same, it makes no difference to me either way. But the whole thing depends upon you to work the same capacity as you working for us to get us government contracts. Ya do it for them. No, in no way would your name be mentioned there or any shares in your name. And if they have to reach you it'll be through strictly, through Sandy.

In the ensuing discussion, the Senator acknowledged, as he had previously told Feinberg and Sandy Williams, that the assistance already promised to the Arab lenders would continue for the Arab purchasers:

> [P]ut it this way to them, that this group to give them, whatever they feel there's some assurance this entity will continue with 'em.
>
> . . . .
>
> And be helpful to them.
>
> . . . .
>
> We got this all together on certain premises and they will, they will continue.

At one point the Senator suggested that a more appropriate selling price might be $100 million. Ultimately Feinberg made a motion that the principals agree to sell the venture, and the other four participants—Senator Williams, Sandy Williams, Katz, and Errichetti—all voted "Aye."

On October 7, at a meeting at the Plaza Hotel in New York City, which was recorded, the Senator and Feinberg explained to the sheik's representatives how Williams' profits from the sale would be concealed, at least for the present. The issue arose when Amoroso told the Senator that Katz had understood from the September 11 meeting that "all of a sudden you were going to announce to the world . . . [t]hat you . . . got 15 million dollars." Williams replied, "Oh Christ no." The exact arrangement was unclear, but the essential point was made by Feinberg in these words: "I know how to get him money now without him declaring it." Some form of a blind trust was to be used, which Feinberg assured the Senator would conceal his interest until he retired. "Then you can say I've got it." The Senator expressed his understanding that while some contemporaneous record would be made, no disclosure would occur until years later:

> There are ways and ways to . . . be on a, on a certain record. Now, if it[']s a blind trust er, uhh that's the way for my purposes, I, I will find a way to . . . make that kind and nobody knows nothing.
>
> . . . .
>
> And then way down the road someone said, well, you know he had all of his interests and nobody knew anything. Well, there we have it under the trust. You see. So I've done what I had to do.

Defenses

In the face of this overwhelming evidence of the Senator's seeking funds for the financing and purchase of a mining venture in which he had an interest in exchange for his assistance in obtaining government contracts for the venture, Williams and Feinberg attempted a defense based on the alternative propositions that either no crimes had been committed, or, if any had been committed, they were the product of government entrapment. *See United States v. Valencia*, 645 F.2d 1158, 1170-72 (2d Cir. 1980) (amended 1981) (outlining limited opportunity for alternative defenses of non-involvement and entrapment).[5]

5 On this appeal, the Government disputes that a defendant who takes the stand and denies commission of a crime may also assert the inconsistent defense that he was entrapped into committing the crime. The point is more pertinent to Senator Williams, who denied committing certain of the acts alleged, than to Feinberg, who denied that the acts committed were criminal in nature. In *United States v. Valencia*, *supra*, 645 F.2d at 1170-72, we noted the division among the circuits as to whether a defendant may both deny commission of a crime and claim entrapment. We ruled narrowly that a defendant could claim non-participation and also entrapment if "he did not take the stand to deny personally his participation in the transaction and did not affirmatively introduce any other evidence that he was not involved." *Id.* at 1172. That ruling permitted a defendant, who did not testify, to argue to a jury that the prosecution had failed to meet its burden of proving either commission of the crime or the defendant's predisposi-

The entrapment contention was put to the jury primarily through the argument of counsel. In their testimony the defendants endeavored to deny the commission of any crimes. Feinberg's approach was to claim that it was legitimate for a Senator to agree to use his influence to help obtain government contracts, despite the Senator's having a financial interest in the venture and seeking loans, necessary for the venture's viability, and the sale of the venture in exchange for his assistance. In Feinberg's view, there was nothing wrong with the arrangement because the Senator was only going to be "opening up the doors" and because he and the Senator intended ultimately to disclose the Senator's interest.

The Senator's equally brazen denial of wrongdoing proceeded on two levels. First, he denied that he had agreed to do anything with respect to government contracts. Though the Senator primarily asserted that he had made no promise to *obtain* contracts, he also insisted, in the face of his recorded statements to the contrary, that he had not agreed even to *try* to secure contracts. He told the jury, "I just knew I was not going to say anything about contracts." Second, the Senator contended that whatever he had done was only to benefit his friends, Feinberg and Sandy Williams: "I knew how hard they were working on this mine, my friends, and I wanted to help them." Despite the recorded conversations in which he received his shares of stock and discussed the concealment of his

---

tion. We did not, however, go further and consider whether a defendant who testifies that he did not commit the crime could also claim, in the alternative, that, if he did, his actions were the product of government entrapment. Because the Government did not object to an entrapment charge in this case and because we find no reversible error in connection with the District Court's handling of the defense of entrapment, we leave open the issue whether inconsistent defenses may be asserted in circumstances beyond those that occurred in *Valencia*.

interest, he told the jury, "I was not interested . . . in receiving any stock."

III.

On appeal, the defendants raise primarily three issues relating to or supplementing their defense of entrapment. First, they contend that the evidence established entrapment as a matter of law, by which they mean that the evidence was insufficient to permit a jury reasonably to find beyond a reasonable doubt that the defendants were predisposed to commit the crimes charged. Second, they contend that the trial judge erred in his charge concerning entrapment. Third, they contend that the totality of the Government's actions in orchestrating the crimes charged constituted outrageous conduct beyond an outer limit of fairness established by the Due Process Clause.

A. Entrapment as a Matter of Law

Appellants contend, and the Government has never disputed, that there was sufficient evidence of inducement of the defendants by the undercover agents to place upon the prosecution the burden of proving beyond a reasonable doubt that the defendants were predisposed to commit the crimes charged. *See Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932). What the parties dispute is whether there was sufficient evidence to permit the jury reasonably to conclude beyond a reasonable doubt that the defendants were predisposed, *i.e.*, "ready and willing without persuasion" to commit offenses of the sort charged and "awaiting any propitious opportunity," *United States v. Sherman*, 200 F.2d 880, 882 (2d Cir. 1952) (L. Hand, J.). Appellants allege that the government agents initiated all aspects of

the crimes, that the Senator and his cohort initially rejected the idea of any criminal conduct, and that government agents improperly persisted in persuading the Senator to commit crimes that they were not ready and willing to commit. We conclude that the evidence permitted the jury to reach quite different conclusions, although the evidence of governmental persuasion is substantial.

Government Initiation

As we have noted, the initial involvement of Senator Williams with the Abscam "sting" operation originated with the Senator, not with the Government. Alerted by Errichetti to the availability of money to be invested by wealthy Arabs, the Senator instructed Feinberg to pursue the matter. Moreover, it was an associate of the Senator's, Sandy Williams, who specified the amount of money, $100 million, that the Senator's group hoped to interest Abdul Enterprises in lending. The first indications that Senator Williams would be of assistance to the venture also originated with the Senator. He had assured Sandy Williams as early as 1975 that he would give the mining venture all the help he possibly could. When the prospect of possible financing from Abdul Enterprises arose in early 1979, the Senator repeated to Sandy Williams his willingness to help the venture and so informed one of the sheik's representatives at the yacht party on March 23, 1979. The first suggestion that the Senator's help might involve use of his official position was Errichetti's statement the next day, March 24, that the Senator "can be of service to you in Washington or wherever. This is government stuff, now." Only after these preliminary indications of the Senator's willingness to be helpful on "government stuff" did the Abscam operatives broach the specific subject of government contracts, first to

Feinberg on May 30 and then to the Senator at the Pierre Hotel on May 31.[6]

Defendants' Reluctance

The record flatly refutes the claim of reluctance on the part of the defendants. Feinberg's response to the first offer of a criminal opportunity on May 30 was, "We can try." On May 31 the Senator assured Feinberg and Sandy Williams that he understood the importance of his help in getting government contracts, and his first response to a government agent's offer of a criminal opportunity was his statement to the sheik's representatives at the luncheon meeting that day that he would "sure try" to get contracts. The Senator repeated his willingness to seek government contracts for the mining venture in conversations with Sandy Williams on June 16 and June 24. On June 19, at a meeting in his Washington office with Errichetti and Feinberg, the Senator expressed no reluctance to Errichetti's urging that he impress the sheik how willing he was to help obtain government contracts. As Feinberg reported to Weinberg in a recorded conversation the night of the Washington meeting, "It's all beautiful. He's very agreeable. No problem." The extent of the Senator's willingness to "try" was made abundantly clear in the Senator's June 28 conversation with the sheik when he offered to use his influence with various government officials including the President. In fact, the record is barren of expressions by the Senator of any hesitation whatever in agreeing to use his influence to try to obtain

---

6 On April 23, 1979, Weinberg asked Sandy Williams whether the Senator could "get us the bids" on government contracts for chemicals. At trial, neither the Senator nor Feinberg made any claim that Sandy Williams ever mentioned this inquiry to them.

Government contracts in order to secure financing for the mining venture.

Appellants take unwarranted comfort in one remark attributed to the Senator by Errichetti and in statements of Sandy Williams, Feinberg, and Katz. Errichetti, in a recorded conversation on June 27, related the June 19 conversation in the Senator's Washington office in which he had told the Senator how important it was to be persuasive when the Senator met the sheik on June 28. Errichetti claims he said to the Senator, "You're gonna fucking guarantee that fucking contract. He said 'no way.' " If the jury credited this remark, which significantly was not mentioned by Senator Williams in his trial testimony, they were entitled to conclude that the Senator was demurring only to making a claim that he would "guarantee" a government contract; his willingness to use his influence to *try* to obtain contracts remained undiminished.

What Williams' brief calls a "negative response" by Sandy Williams and Feinberg is their momentary uncertainty as to whether the Senator would try to obtain government contracts. Sandy Williams said on April 23, "Well, I don't know about that." Feinberg said on May 31, just before the Pierre Hotel luncheon, "Well, this I didn't know until now I have to ask him that." However, Feinberg's very next sentence was, "I would assume, I know that he's often opened up many doors. You understand what I'm talking about, and with his blessing [—]."

No more helpful to defendants is Katz' comment to Weinberg in a recorded conversation on June 10, that the Senator "doesn't use that power for any advantages." The context makes clear that Katz was referring to the Senator's reluctance to use power for leadership within the Senate. As Katz explained, "He's not the kind of a

guy like Long or Kennedy, where they've got the power and they use it." When Weinberg then said, "Well he said he would get us the contracts you know," Katz replied, "Oh there's no question if he's got an interest, he'll do something like that, naturally."

Even more unhelpful to appellants' cause are the occasions on which, according to appellants, the Senator refused opportunities to receive unlawful payments, separate from the millions of dollars he agreed to accept for the financing and purchase of the mining venture. These episodes, in fact, provided the jury with additional evidence of a damning nature. The first episode concerns Weinberg's July 9, 1979, offer to Sandy Williams to pay the Senator $20,000 in cash as "expense money." Sandy Williams testified that he relayed the offer to the Senator on July 18. The Senator asked, "Sandy, do I have to be handed the money?" to which Sandy Williams answered, "Pete, I don't want you to be handed the money." The Senator then suggested that Sandy Williams "go and get the 20,000" and agreed to split the money with him. The next day the Senator suggested that Sandy Williams send part of the cash to the Senator's son who needed funds to purchase a car. When the undercover agents learned of the Senator's unwillingness to accept the cash personally, they decided not to make the payment.

The second episode occurred on January 15, 1980, when the Senator met with the sheik for the last time. The conversation was recorded. The sheik offered to pay the Senator cash in return for the Senator's assisting him to immigrate and obtain permanent residence. The Senator refused, explaining "when I work in that area, that kind of activity, it is purely . . . public." But, despite having been offered a bribe, the Senator stated his willingness to help the sheik with his immigration problem because this

would help the mining venture succeed. The Senator referred to his help as "a desirable thing to do for you, personally" and "part of creating something of value, bringing in that ore."

Government Persuasion

Once Senator Williams expressed a willingness to agree to use his influence to try to obtain government contracts, Weinberg, acting for the Government, endeavored to make sure that when the Senator met with the sheik, he would spell out his willingness clearly and emphatically for the benefit of the sheik and the television camera. To achieve this objective, Weinberg enlisted Errichetti and Feinberg and then took on the assignment directly. On June 7, Weinberg told Errichetti, in a recorded conversation, "Let Tony [Agent Amoroso] and you speak to Senator . . . all we want to hear from him is that he's going to get us some government contracts." On June 15, in a recorded conversation, Weinberg told a group of the Senator's associates, including Errichetti and Feinberg, "The Senator's gotta be told alright? In no [un]certain terms that he's gotta move his fucking ass to get the goddamn government contracts."

The messengers warmed to their task. In a recorded conversation on June 27 Errichetti gave a group of the Senator's associates this account of a June 19 session he had had with the Senator in his Senate office:

> When I went there, he didn't say two fucking words. I got Pete by the fucking throat, I tell you about as close as I came in this office. Let me tell you something . . . don't you go fucking this thing up. I got a chance to make a fucking million dollars . . . . All you're gonna do is give a fucking speech like you

> never gave in your life . . . . You're gonna fucking guarantee that fucking contract. He said "no way."
>
> . . . .
>
> He said, "no way." I said you're gonna fucking say it. . . . Never mind about doing it. You're gonna fucking say it."

At the same June 27 session, Feinberg reported, "I also told Pete that he after that won't ever have to open his mouth." In anticipation of the next day's meeting with the sheik, Feinberg telephoned the Senator from the meeting and told him, "Eric [Errichetti] will talk to you before you go in and just like he said it[']s a bullshit speech."

On June 28, in a recorded conversation ten minutes before the Senator's meeting with the sheik, Weinberg personally carried the message to the Senator in these words:

> Forget the mine. Don't even mention the mine. All you have to do is tell him, alright.
>
> . . . .
>
> How high you are in the Senate. He's interested in you.
>
> . . . .
>
> Without, without you there is no deal. You are the deal. You put this together. You worked on this and you can get, you got the government contracts. Without me there is no government contracts.
>
> . . . .
>
> [A]nd you tell him in no [un]certain terms without me there is no deal. I'm the man. I'm the man who's

gonna open the doors, I'm the man who's gonna do this to use my influence and I guarantee this. Follow me?

. . . .

All bullshit.

. . . .

And that's it, it goes no further, it[']s all talk, all bullshit. That's all he wants to hear.

. . . .

It's a walk-through. You should be out of there in twenty minutes.

. . . .

You're on stage for twenty minutes.

. . . .

So you ready to go on-stage?

As we recounted in *Myers II*, *supra*, 692 F.2d at 839-40, this "coaching" by Weinberg, especially the June 28 episode, dismayed at least some Government prosecutors and precipitated a meeting of prosecutors and F.B.I. agents on August 9, 1979, at which Weinberg was cautioned about such tactics.

Basis for a Finding of Predisposition

Notwithstanding the evidence of persuasion, the jury was fully entitled to find, from the totality of the evidence, that the defendants were "ready and willing" to commit the crimes charged as soon as the opportunity was first presented—to Feinberg on May 30 and to Senator Williams on May 31—and at all times thereafter. At no time did either defendant hesitate or express any

reluctance. Even if the jury believed that the Senator told Errichetti on June 19 that he could not "guarantee" government contracts, he continually expressed to the agents, and to his associates in private conversations, his willingness to use his influence to try to obtain the contracts for a venture in which he had a concealed interest. And the evidence fully entitled the jury to conclude that the defendants understood that the Senator's agreement to help to obtain contracts was a condition for obtaining the loan and later the prospect of a sale. The jury was also entitled to consider his prompt willingness to accept half of the $20,000 in "expense" money that Weinberg discussed with Sandy Williams. And the jury could also consider his agreement to assist the sheik on an immigration problem as "part of creating something of value, bringing in that ore."

The "coaching" carried out by Weinberg on June 28 and earlier through Errichetti and Feinberg was a factor to be considered by the jury in assessing predisposition, but these tactics do not detract from the sufficiency of the evidence of the Senator's predisposition because the jury was entitled to conclude, as the Senator himself testified, that he paid little attention to what Errichetti and Weinberg told him and decided for himself what he would say at the crucial June 28 meeting with the sheik.[7] Indeed, the

---

7 On direct examination, when asked about Weinberg's "coaching" session with him on the morning of June 28, the Senator testified:

> I think I said yesterday, this is not for me, what he's talking about, that kind of effort to impress the Sheik. I was going to do it my way. So, I didn't really concentrate on that which was meaningless to me.

On cross-examination, this exchange occurred:

> Q. And didn't Errichetti tell you on June 19th that the only thing the sheik was interested in is your telling him that you would get government contracts?

salient feature of the entrapment defenses asserted in this case is that both defendants testified and neither one even claimed that the persuasion of the government agents had prompted them to commit the crimes charged.[8] That omission may have been the inevitable consequence of their trial strategy of simultaneously denying criminal conduct and claiming entrapment. Whatever their motive, the defendants, by their testimony, made it relatively easy for the prosecution to sustain its burden of proof on predisposition.

On the entire record, Judge Pratt was correct in ruling that the prosecution presented sufficient evidence of the defendants' predisposition to permit the jury to reject their defense of entrapment.

B. Challenge to the Entrapment Instructions

Appellants contend that the entrapment instructions were erroneous in two respects. They first claim that Judge Pratt removed the issue of entrapment from the jury's consideration. The basis for this claim is the following portion of the charge:

> You are not to be concerned with whether the prosecution or the F.B.I. agents or Mr. Weinberg acted legally or illegally, properly or improperly or

---

A. If he said that, it didn't register with me because my mind was not accepting government contracts as any part of this thing.

Earlier, when asked on direct examination whether he had been "put off" by what Errichetti and Weinberg had urged him to say, he answered:

It was offensive but it didn'[t] mean a great deal to me to tell you the truth.

[8] Feinberg claimed in his trial testimony that he had been "under a lot of pressure by Mr. Weinberg," but he also insisted, "We had done nothing at all illegitimate."

whether the Abscam investigation itself was conducted properly. Those are questions which must be decided by me at an appropriate time.

The challenged sentences were not error. It was not any part of the jury's function to decide whether the Abscam tactics were illegal or improper. Their function, as Judge Pratt told them, was to decide whether they were satisfied beyond a reasonable doubt that each defendant was predisposed to commit the crimes charged. And with respect to that question Judge Pratt instructed as follows:

> In determining whether either defendant, if afforded a favorable opportunity, was predisposed to engage in the kind of criminal activity for which he is charged, you should look to the totality of the circumstances shown by the evidence, including the nature and extent of the inducement offered. In weighing the circumstances to determine this issue of predisposition, you may consider, among other things, the impact that the conduct of the government agents had on the defendant, both directly and indirectly through its effects on the alleged co-conspirator Sandy Williams, George Katz, and Angelo Errichetti.

In the same vein, the sentence immediately preceding the passage complained of by the appellants instructed the jury as follows:

> What the F.B.I. agents and Mr. Weinberg did should concern you only to the extent that you find that it affected the conduct and state of mind of a defendant or other participants in the conspiracy or only insofar as it may affect the credibility of any witness with respect to the matters before you.

The charge, taken as a whole, fully and fairly permitted the jury to consider the Abscam tactics as they related to the defense of entrapment.

The second claim arises from Judge Pratt's response to a question asked by the jury during deliberations. The jury's note read as follows:

> Would you kindly explain the legal guidelines of a scam operation?
>
> At what point do the practices or methods used in a scam become entrapment in regards to the law?
>
> Does entrapment have to be established from day one of the indictment or can it be established further along in the operation?

This note precipitated an extended colloquy between Judge Pratt and counsel for both defendants. Attorney Koelzer, representing Williams, began by noting that part of the inquiry had misstated the burden of proof with respect to entrapment. Whereas the note had asked, "Does entrapment have to be established from day one of the indictment," Koelzer correctly pointed out that, once inducement is shown, the Government has to prove predisposition. Taking the jury's phrase, he maintained that predisposition had to be proved " 'from day one.' In other words, from on or about the first day of January, 1979, these two men were predisposed beyond a reasonable doubt—." Judge Pratt promptly interjected, "That is an overstatement." Attorney Batchelder, representing Feinberg, pointed out that the question related to entrapment, not predisposition, and that entrapment can occur anytime during the scheme. Disputing Attorney Koelzer, he added, "So when he says that you have to have entrapment from square one, the answer is no, no, no, no." He then suggested that the entrapment portion of

the original charge be reread in full. Judge Pratt then ascertained that both counsel agreed to that suggestion.

When the jury was recalled, Judge Pratt began by making sure the jury understood that, since inducement was not disputed, the defendants had no burden to establish anything with respect to entrapment, that the burden was upon the Government to disprove the defense by showing that the defendants were predisposed to commit the crimes. At that point, he made the statements that appellants now contend created reversible error:

> You said from day one, or at some other time. You have to decide when the crime was committed, if you get to that element, and then determine as of that time when he committed the crime was he predisposed to do it or wasn't he.

This was followed by a rereading of the entrapment portion of the original charge. At the conclusion of the supplemental charge, Judge Pratt asked if there were exceptions and counsel took none, other than to preserve their prior objections to the original charge.

As a general proposition of law the fragment of the supplemental response now challenged by appellants was erroneous. A defendant's predisposition is not to be assessed "as of that time when he committed the crime." Normally, predisposition refers to the state of mind of a defendant before government agents make any suggestion that he should commit a crime. By "state of mind" we do not mean to require specific prior contemplation of criminal conduct. It is sufficient if the defendant is of a frame of mind such that once his attention is called to the criminal opportunity, his decision to commit the crime is the product of his own preference and not the product of government persuasion. The phrase "ready and willing"

adequately captures that concept and does so in a manner likely to be comprehensible to juries.

In the circumstances of this case, however, the erroneous statement in the supplemental charge does not warrant reversal for several reasons. First, neither counsel, after hearing the statement, objected to it or asked for a clarifying instruction. Second, neither counsel had suggested to Judge Pratt a correct statement of the law that would have answered the jury's questions. Attorney Koelzer's initial suggestion that predisposition had to be proved from "day one . . . on or about the first day of January, 1979" was, as Judge Pratt noted, an overstatement. The earliest that predisposition had to be established was as of the time when the agents first presented the criminal opportunity to the defendants, which was May 30 with Feinberg and May 31 with the Senator. There was no reason to focus the jury's attention on the Senator's state of mind at the start of the indictment period, which was five months before any criminal opportunity was broached by the undercover agents.[9]

---

9 The standard charge on entrapment requires the prosecution to prove that the defendant was ready and willing to commit the crimes charged "before anything at all occurred respecting the alleged offense." 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 13.09, at 364 (3d ed. 1977). In many cases, including this one, undercover government agents discuss non-criminal matters with a target before presenting a criminal opportunity. Such preliminary contact is normally not conduct "respecting the alleged offense." Since the entrapment defense exonerates a defendant who has been induced to commit a crime he would not otherwise have committed, the inducement must consist of efforts to persuade him to commit the crime, and those efforts will normally not occur until the criminal proposition has been broached. Simply cultivating the friendship of a target preparatory to presenting a criminal opportunity is not inducement to commit a crime.

We do not rule out the possibility, however, that cases may arise in which the agents in their preliminary contacts with a target indirectly suggest that a crime might occur, even though they do not explicitly invite the target to commit one. In the pending case, the first contact

Third, the isolated remark complained of was followed by a rereading of the full charge on entrapment,[10] which correctly set forth the applicable principles, *see United States v. Parisi*, 674 F.2d 126, 128 (1st Cir. 1982), and, following *United States v. Viviano*, 437 F.2d 295, 299 (2d Cir.), *cert. denied*, 402 U.S. 983 (1971), focused the jury's attention on the three possible bases of proving predisposition—a design to commit the offense formed prior to any inducement, a prompt and unhesitating agreement to the corrupt proposal, or an existing course of similar conduct. Fourth, and most important, on the facts of this case, the statement as to time of predisposition was not prejudicial because the criminal opportunity was accepted when it was first presented. The time when the crime was first committed virtually coincided with the pertinent time for assessing predisposition. Thereafter the Senator simply repeated and emphasized his willingness to commit

---

by the Abscam operatives with the defendants that involved any discussions "respecting the alleged offense" was the presentation of a criminal opportunity on May 30.

10 The charge included the following language:

> Under the law of entrapment, therefore, that leaves for you, the jury, to determine as the decisive question on this entrapment issue whether the defendant was predisposed to commit the crime; that is, whether he was ready and willing to commit a crime such as charged here whenever a favorable opportunity was offered.
>
> To sustain its burden of proof the government has to satisfy you that its agents have not induced an innocent person, but that the inducement which brought about the offenses charged simply brought about another instance of the kind of conduct which the defendant was prepared to engage in, if offered an opportunity which appeared favorable. Thus, if the prosecution has satisfied you beyond a reasonable doubt that the defendants were ready and willing to commit the offenses charged whenever a favorable opportunity was offered to commit them, then you may find the government did no more than furnish a convenient opening for the criminal opportunity in which the defendants were prepared to engage.

the crimes. On the facts of this case, the supplemental charge, taken as a whole, contained no prejudicial error.

C. Claim of a Due Process Violation

Appellants contend that the methods used by the government agents in developing the cases against them exceed an outer limit of fairness mandated by the Due Process Clause. This argument is to be distinguished from the basic defense of entrapment. That defense, as recognized in the federal courts, focuses on the state of mind of the defendant and precludes conviction only when government agents by their inducements prevail upon a person who was not predisposed to commit the type of crime charged. Though it has been insistently urged that the entrapment defense should focus exclusively on the conduct of the agents and preclude a conviction whenever their conduct could be expected to induce an average person to commit the crime, *see, e.g., Sherman v. United States, supra,* 356 U.S. at 378-85 (Frankfurter, J., concurring); *Sorrells v. United States, supra,* 287 U.S. at 453-59 (Roberts, J., concurring), a majority of the Supreme Court has never accepted this objective test. However, in recent years, the minority of those on the Supreme Court favoring an objective test has been somewhat encouraged by the suggestion, subscribed to by five members of the Court in *Hampton v. United States,* 425 U.S. 484, 491-95 (1976) (Powell, J., concurring, joined by Blackmun, J.); *id.* at 495-500 (Brennan, J., dissenting, joined by Stewart and Marshall, JJ.), that extreme cases may arise where the government conduct was so outrageous as to violate due process, even though the evidence permitted the jury to find that the defendant was predisposed. Since the Supreme Court has never applied the Due Process Clause to invalidate a conviction based on "outrageous" govern-

mental inducement, we do not know what sort of circumstances the Court believes would meet this elusive standard. In assessing whether the circumstances of a given case present such extreme facts, care must be taken, as the Third Circuit has observed in an Abscam case, "not to undermine the Court's consistent rejection of the objective test of entrapment by permitting it to reemerge cloaked as a due process defense." *United States v. Jannotti*, 673 F.2d 578, 608 (3d Cir.) (en banc), *cert. denied*, 102 S. Ct. 2906 (1982).

We have previously declined to hold that the Abscam operation violated the Due Process Clause, *Myers II*, *supra*, 692 F.2d at 836-47; *United States v. Alexandro*, 675 F.2d 34, 39-42 (2d Cir.), *cert. denied*, 103 S. Ct. 78 (1982), and we see no basis for concluding that the activities of the government operatives directed against the defendants in this case exceeded the constitutional limits of fairness. Appellants point most insistently to the "coaching" activities of Weinberg, which we have recounted. It is understandable that agents who have heard a suspect make incriminating statements or been told by others that he has made them will be anxious to provide an opportunity for the suspect to repeat these statements under circumstances where they can be surreptitiously, though lawfully,[11] recorded. Appellants maintain, however, that Weinberg went further and endeavored to put words in the Senator's mouth.[12] However these

---

11 Appellants' claim that the recordings violated their Fourth Amendment rights is entirely without merit. In every instance, recordings were made by a participant to the conversations in whom the other speakers had simply misplaced their confidence. *United States v. White*, 401 U.S. 745, 752-53 (1971); 18 U.S.C. § 2511(2)(c) (1976).

12 There was evidence at the due process hearing, denied by Weinberg, that at the August 9, 1979, meeting at which Weinberg was reprimanded, he told the agents that he had "to put words in people's

"coaching" tactics might square with our personal notions of appropriate law enforcement conduct, our judicial task is to measure these tactics against the as yet undefined standard of "outrageous" conduct that the Supreme Court has suggested might offend constitutional limits. That standard was not exceeded in this case. There is lacking in this record any indication that the "coaching" was persistently directed at an unwilling subject in an unconscionable effort to erode his law-abiding instincts. The most that Weinberg did was to spell out for the Senator how to commit the crimes, but his "coaching" involved neither pressure nor persistent exploitation of personal weakness, as might occur if an agent preys upon an addict's need for narcotics. *See Sherman v. United States, supra.* Moreover, it would be hard to imagine that government conduct could ever be deemed so outrageously unfair to a defendant as to warrant dismissal of charges when the defendant asserts that he scarcely paid any attention to what was said to him.

One aspect of this case that distinguishes it from prior Abscam convictions is the size of the inducements offered to the defendants. The proposed loan of $100 million and the proposed profits of $70 million from the sale unquestionably involve sums of money far in excess of the amounts normally tendered by government agents in an attempt to catch an "unwary criminal," *Sherman v. United States, supra*, 356 U.S. at 373. However, as Judge Pratt pointed out, 527 F. Supp. at 1101, the loan was to be repaid with interest. Therefore, its value to the defendants was not the amount of the loan, but rather the

---

mouths or we won't make any cases." The remark was testified to by two FBI agents. *See Myers, II, supra*, 692 F.2d at 839. Whether or not Weinberg made the remark, his conduct glaringly reveals that the alleged remark accurately reflected his intent.

profits they anticipated making as a result of securing financing for their venture. Whatever profits were anticipated were the result of the defendants' estimates; the agents did not offer to assure any particular level of profits in connection with the proposed loan. Moreover, the amount of financing needed for the venture was determined by Sandy Williams and proposed to the agents. Only the purchase proposal involved selection by the Abscam operatives of a dollar figure, and even this figure was related to the figures already proposed by the principals in the mining venture. The combined property that the second group of Arabs was purportedly interested in buying included the American Cyanamid plant, which Sandy Williams had estimated could be purchased for $70 million.

We doubt that the size of an inducement can ever be considered unconstitutional when offered to a person with the experience and sophistication of a United States Senator. In this case the claim is wholly without merit. There is no evidence that the Senator's anticipated share of the profits from the loan or the sale exerted an unconscionable pressure upon him. He readily agreed to the loan transaction, and when the purchase was proposed, he calmly discussed with his associates whether the loan or the purchase was more advantageous for them and then, without any hesitation, agreed to the purchase. He even suggested at one point that the sale price should be increased to yield profits of $100 million. When a Senator elects to interest himself in transactions involving large sums of money, he cannot claim that it is unconstitutional for undercover agents to frame their offers of criminal opportunities within the financial context he has already established.

Apart from the clear evidence of Weinberg's "coaching" and the size of the inducements, the appellants' complaints about Abscam are not different from those voiced by defendants in *Myers II*. These include the use of as disreputable a person as Weinberg, the failure to record every conversation with all of the co-conspirators (although no claim is made of an exculpatory remark made to a government agent that was not recorded), the lack of a basis for suspecting Senator Williams before responding to the overtures initiated by Errichetti and Feinberg at the Senator's suggestion, and the failure to ascertain that the Senator would accept a criminal opportunity before the agents met with him. None of the circumstances cited by the appellants, nor their aggregate effect, constitutes the sort of outrageous imposition upon an individual that might exceed a due process test of constitutional fairness. *See Myers II*, *supra*; *United States v. Alexandro*, *supra*; *United States v. Jannotti*, *supra*.

One aspect of the evolution of the criminal conduct evidenced by the record merits additional comment. When the Abscam operatives broached the possibility of criminal conduct to the Congressmen in *Myers II*, the proposal was, from the start, a clear-cut invitation to commit a crime: $50,000 was offered solely in exchange for an agreement to use official influence with respect to an immigration matter. The criminal opportunity presented to Senator Williams differs in one important respect. The financial inducement, the $100 million loan, was initially discussed in connection with what appeared to be an entirely legitimate business transaction. Then, after Errichetti suggested that the Senator "can be of service," the agents broached the prospect of the Senator's unlawfully using his influence for private gain.

We recognized in *Myers II* the possibility that "at some point deliberate governmental efforts to render ambiguous events over which agents can exercise considerable control would transgress due process limits of fundamental fairness." 692 F.2d at 843. The subtle shifting of a legitimate proposal into an unlawful one, as occurred in this case, has the potential for presenting a jury with close questions of intent and risking incorrect fact-finding—a risk that could be substantially reduced if agents simply put to a target the kind of straightforward proposal offered to the Congressmen in *Myers II*. Of course, many cases involve the risk that juries will incorrectly assess key facts, especially those, like intent, that cannot be objectively ascertained. It is not the risk of factual error that creates unease; it is the needless creation of that risk by governmental action.

We have reviewed the record with this concern in mind and have reached the conclusion that the clarity of the evidence places this case well short of any point at which we might be apprehensive that the verdicts had been rendered needlessly questionable by governmentally created ambiguities in the presentation of a criminal opportunity to a target. The evidence not only permitted the jury to find the Senator and his accomplice guilty; it reveals them as unmistakably involved in a corrupt agreement to misuse public office for private gain. The ultimate terms of the proposal were put to the Senator with clarity on repeated occasions. His understanding was evidenced by his own recorded statements on June 28 and again on September 11. And his state of mind was fully revealed not only by his statements with respect to the crimes charged but also by his willingness to accept cash if he could receive it indirectly and his willingness to help the mining venture succeed by assisting on an immigra-

tion matter for which he had been offered (and had refused) a cash bribe. On this record we find no unconstitutional conduct that taints the validity of a judgment of conviction.

IV.

Appellants make three claims concerning the construction of the statutes under which they were indicted. First, they contend that Counts Four and Eight failed to state an offense under the conflict-of-interest statute, 18 U.S.C. § 203(a), because the prospective government contracts for the purchase of titanium were not identified with sufficient particularity. The statute punishes receipt of compensation for services to be rendered in relation to any "proceeding, application, . . . contract, claim, . . . or other particular matter" in which the United States has a substantial interest.[13] We accept the appellants' argument, based on the structure of the statute, that the phrase "other particular matter" has the effect of causing the adjective "particular" to modify all of the preceding nouns, including "contract." However, we disagree that the force of the adjective is so strong as to require pleading or proof of a single contract identified by contract number or similar individualized detail. It is sufficient if the compensation has been received for services to be rendered with respect to a particular category of contracts. The description of government contracts for the purchase of titanium sufficiently particularizes the services to be rendered in this case to state an offense. The fact that the statute applies to future proceedings not yet pending, *United States v. Evans*, 572

---

13 The scope and background of section 203(a) are reviewed at length in *Myers II*, *supra*, 692 F.2d at 853-58.

F.2d 455, 481 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978); *United States v. Johnson*, 215 F. Supp. 300, 316 (D. Md. 1963), *aff'd*, 337 F.2d 180, 196 (4th Cir. 1964), *aff'd on other grounds*, 383 U.S. 169 (1966), indicates that it applies to a particular category of matters, and need not be narrowed to just one identified contract, which might not be known until a proceeding involving the contract was actually pending.[14]

Second, the appellants contend that Count One, the conspiracy charge, failed to state an offense under 18 U.S.C. § 371 because it alleged that an objective of the conspiracy was to deprive the United States of the "honest and faithful services of a United States Senator." Their point is that a United States Senator, having been elected by the citizens of his or her state, owes honest and faithful service only to them and not to the United States. The argument is without merit. The numerous statutes enacted to punish criminal behavior by Members of Congress demonstrate the assertion of a significant interest on the part of the national government in the honest performance of duties by those elected to the national legislature. There can be no serious doubt as to the constitutionality of these statutes.

---

14 Unlike Congressman Murphy, whose conviction for violating the conflict-of-interest statute was reversed, *see Myers II*, *supra*, 692 F.2d at 853-58, Senator Williams made no claim that his efforts with respect to matters before government agencies would be limited to giving advice, as distinguished from acting in a representative capacity to secure favorable treatment. Though the charge as to the conflict-of-interest violation in the pending case broadly (and erroneously, *id.*) stated that the services covered by section 203(a) include giving advice, the broad charge was not objected to at trial, the evidence showed only an agreement to try to influence government officials to award contracts, and no claim concerning the scope of services covered by section 203(a) is raised on appeal. On this record, the error with respect to the section 203(a) charge is harmless and has been waived.

Third, appellants contend that the phrase "anything of value," receipt of which is proscribed by the statutes punishing bribery, 18 U.S.C. § 201(c), and unlawful gratuity, 18 U.S.C. § 201(g), means something that objectively has actual value. Their point in this regard is that the stock received by the Senator had no commercial value, and that Judge Pratt erred when he told the jury that stock could be a thing of value "if, regardless of its actual worth in the commercial world, you find that the defendant believed that the stock had value for himself." We think Judge Pratt correctly construed the statutes to focus on the value that the defendants subjectively attached to the items received. The phrase "anything of value" in bribery and related statutes has consistently been given a broad meaning, *e.g.*, *United States v. Girard*, 601 F.2d 69, 71 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979), to carry out the congressional purpose of punishing misuse of public office. Corruption of office occurs when the officeholder agrees to misuse his office in the expectation of gain, whether or not he has correctly assessed the worth of the bribe. When the Senator received shares of stock in the three corporations organized to hold the properties of the mining venture, he expected these shares to have considerable value, representing not only the potential value of the properties but also the benefit of the contemplated loan of $100 million.

V.

Only two of the appellants' remaining contentions merit any discussion. First, appellants contend that the District Court erred in admitting evidence of two transactions in which Senator Williams used his influence in an effort to advance the financial interests of himself and his

wife. One effort concerned the application of the Ritz-Carlton Casino to obtain a casino license from the New Jersey Casino Control Commission and to secure exemption from Commission guidelines requiring new construction. The Hardwicke Companies, part of the consortium backing the Ritz-Carlton, employed the Senator's wife as a consultant and later paid a $50,000 fee to defendant Feinberg. The Senator himself expected to receive $1 million as his share of a finder's fee to be paid in connection with financing for the Ritz-Carlton, which was to be supplied by Abdul Enterprises. Just prior to the Commission's vote on the Ritz-Carlton application in May 1979, the Senator, without any urging by the Abscam operatives, called the Commission chairman. In a recorded conversation on October 7, 1979, the Senator acknowledged making the call; his efforts and similar efforts by Feinberg were asserted by Feinberg, in the same conversation, to have "changed" the Commission's "mind" and saved $30 million. The other effort concerned the Senator's contacts during the 1970's with various New Jersey officials on behalf of Biocel of New Jersey, a corporation formed by Sandy Williams to franchise garbage recycling technology. Sandy Williams had given half of his interest in Biocel to Senator Williams, the Senator had brought Feinberg into the project, and the Senator and Feinberg had subsequently decided to give a 13% interest in a subsidiary of Biocel to the Senator's wife.

Conduct " 'morally indistinguishable' " from the offenses charged is probative on the issue of predisposition, *United States v. Viviano*, *supra*, 437 F.2d at 299 n.3 (quoting *United States v. Becker*, 62 F.2d 1007, 1009 (2d Cir. 1933)), and admissible subject to the usual weighing of probative force against unfair prejudice as mandated

by Fed. R. Evid. 403. Since counsel for appellants argued strenuously to the jury that any criminal conduct occurring in connection with the Senator's agreement to try to obtain government contracts for the titanium mining venture was the product of governmental inducement, it was appropriate to present evidence of the Senator's use of his influence on behalf of himself and his wife in circumstances where no government agent asked him to do so. Even if, as appellants contend, the Senator's conduct in the Ritz-Carlton and Biocel matters did not violate New Jersey law, it was probative of his willingness to agree to take similar action to obtain titanium contracts from the federal government, conduct that violates federal law. Judge Pratt's admission of the Ritz-Carlton and Biocel evidence was well within his discretion.

The remaining contention is that Count One of the indictment was duplicitous in alleging a conspiracy both to defraud the United States and to commit various substantive offenses. "The allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for 'The conspiracy is the crime, and that is one, however diverse its objects.' " *Braverman v. United States*, 317 U.S. 49, 54 (1942) (quoting *Frohwerk v. United States*, 249 U.S. 204, 210 (1919)). This principle has been specifically applied to a single count charging conspiracy to defraud the United States and to commit substantive offenses. *United States v. Manton*, 107 F.2d 834, 839 (2d Cir. 1939), *cert. denied*, 309 U.S. 664 (1940). The specificity of the conspiracy-to-defraud allegations and the jury's verdicts on the substantive counts eliminate any possibility of the concerns expressed in *United States v. Rosenblatt*, 554 F.2d 36, 40-42 (2d Cir. 1977), on which appellants rely, that a count alleging only a conspiracy to defraud the United States in some unspecified way risks

conviction without either an allegation or proof of the essential nature of the fraud.

VI.

We have considered appellants' other claims and are satisfied that they are without merit and do not warrant discussion. For all of the reasons set forth in this opinion and for the further reasons set forth in the comprehensive opinion of Judge Pratt, denying the defendants' post-trial motions, we conclude that both appellants were fairly tried and that there is no legal infirmity in their convictions. The judgments appealed from are affirmed.

APPENDIX B

Opinion of the District Court on Due Process Issues
529 F. Supp. 1085 (E.D. N.Y. 1981)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. CR 80-00575

UNITED STATES OF AMERICA

v.

HARRISON A. WILLIAMS, JR. and
ALEXANDER FEINBERG,
Defendants.

Dec. 22, 1981

GEORGE C. PRATT, District Judge.

TABLE OF CONTENTS

Page No.

I. PRIOR PROCEEDINGS ..... [47a]
II. EVIDENCE AT TRIAL ..... [50a]
III. THE JURY'S VERDICTS ..... [53a]
IV. DEFENDANTS' ARGUMENTS ..... [56a]
V. MOTION TO SUPPRESS TAPES ..... [57a]
VI. INSUFFICIENCY OF EVIDENCE TO SUPPORT FEINBERG'S CONVICTION ON COUNT 5 ..... [58a]
VII. CLAIMED ENTRAPMENT ..... [59a]
VIII. CLAIMED OUTRAGEOUSNESS ..... [65a]
A. The "Coaching" Incident ..... [66a]
B. Timing of Interruptions ..... [70a]
C. Internal Governmental Memorandum ..... [72a]
D. Selective Prosecution ..... [73a]
E. Amount of Inducement ..... [75a]
F. Miscellaneous Instances of "Outrageous" Conduct ..... [76a]
G. Cumulative Effect ..... [76a]
IX. CLAIMED MISCONDUCT BY GOVERNMENT AT TRIAL ..... [77a]
A. Ritz Casino Evidence ..... [78a]
B. Biocel Evidence ..... [79a]
C. The Purpose for the Resale "Stall" ..... [80a]
D. Feinberg as "Bag Man" ..... [83a]
E. Summations ..... [85a]
X. CONCLUSION ..... [86a]

POST-TRIAL MEMORANDUM AND ORDER

Having been found by the jury to have been predisposed to commit the crimes of bribery, unlawful gratuity, conflict of interest, interstate travel, and conspiracy, defendants Williams and Feinberg now urge the court to set aside the jury's verdicts and dismiss the indictment for due process and related reasons. After considering the arguments advanced and weighing all the evidence adduced in this and related cases, the court concludes that with one exception, the motions to dismiss, for judgment of acquittal, and for a new trial must all be denied. The one exception concerns defendant Feinberg's motion for judgment of acquittal on count 5, discussed in section VI, *infra*.

I. PRIOR PROCEEDINGS

U.S. v. Williams, et al., CR 80-00575, was the fourth Abscam case tried before this court. In contrast to the three previous cases, which were transferred from Judge Mishler in August, 1980, this case was directly assigned to the undersigned as a "related" case when the indictment was filed on October 30, 1980. The case was originally set down for trial in February, 1981, but was later adjourned at defendants' request.

Extensive pretrial motions were filed, argued, and ruled upon. Defendants' motions to have the case reassigned, to dismiss the indictment on speech and debate grounds, to hold a pretrial due process hearing, for a severance, to inspect portions of the grand jury transcripts, for dismissal of the indictment due to pretrial publicity, for a pretrial hearing on the admissibility of co-conspirator hearsay statements, for dismissal due to delay in presenting the case to the grand jury, for dismissal of portions of the indictment on grounds of duplicity and multiplicity, to disqualify Thomas Puccio from prosecuting the case, to suppress all tape recordings involving Melvin Weinberg, to inspect all of the records

of the jury clerk, for disclosure of income tax information relating to defendant Williams gathered by the government, and other requests were all denied. Numerous other motions seeking discovery, production of documents, a bill of particulars, and copies of videotapes, audio tapes, and transcripts were granted in part.

Motions for severance by defendants Katz and Errichetti were granted. Decision on defendant Williams' motion to dismiss on grounds of selective prosecution was reserved, and the motion was consolidated with defendants' due process claims, decision on which was deferred until after the jury trial.[1] At least five pretrial appeals were taken to the Second Circuit, but this court's denial of the motion to dismiss on speech and debate grounds was affirmed, and the other appeals were dismissed as untimely. All motions to stay the trial were denied either by this court or the Court of Appeals.

Trial commenced on March 30, 1981, and continued until May 1, when the jury returned its verdicts of guilty on all counts against both defendants. A post-trial "due process" hearing was held on June 22 through June 25, 1981, for which additional discovery materials were sought and provided. The court approved a post-hearing briefing schedule that was protracted in order not to interfere unduly with defendant Williams' efforts to meet

---

[1] Defendant Williams made an additional pretrial motion seeking disclosure of any prior electronic surveillance in order to assess whether the government had determined to prosecute Williams because of any information obtained through surveillance activities. The government requested that the results of an "all agency search" be furnished to the court, and the court inspected the documents furnished in response to the search. The court did not disclose the contents of the documents to defense counsel, but assured them that no materials relevant to the instant case had been produced. Defense counsel at one point continued to request access to the materials furnished to the court, which request was denied. The materials were placed under seal and are available for appellate review.

charges pending in the United States Senate; that schedule was later extended further at defendants' request. On October 21, 1981 the court heard oral argument by all sides.

In addition to the records of the trial and post-trial hearings, the parties have had available to them for use on this "due process motion" the trial transcripts from the *Myers*,[2] *Lederer*,[3] and *Thompson*[4] cases, as well as the transcript from the consolidated post-trial hearing[5] held in those cases. Moreover, the court advised counsel that it would consider all of the arguments made by defendants in those three related Abscam cases, as well as any evidence from the Philadelphia and Washington Abscam cases[6] that might be brought to the attention of the court through counsel.

The specific post-hearing papers submitted on the instant motions include Williams' memorandum and reply memorandum in support of the motion to dismiss on due process and related grounds; Williams' brief and reply brief in support of motions for judgment of acquittal or a new trial; Feinberg's memorandum in support of all post-trial motions; the government's post-hearing memorandum in opposition to all motions; letters from Williams' attorneys of record dated October 23, 1981 and November 14, 1981; and a letter from Feinberg's attorney dated November 14, 1981. In addition, defendant Williams relies on two briefs filed pretrial relating to his

---

[2] *U.S. v. Myers et al.*, 527 F.Supp. 1206 (E.D.N.Y. 1980).

[3] *U.S. v. Lederer et al.*, 527 F.Supp. 1206 (E.D.N.Y. 1980).

[4] *U.S. v. Thompson et al.*, 527 F.Supp. 1206 (E.D.N.Y. 1980).

[5] Consolidated memorandum and order denying "due process" and other post-trial motions (July 24, 1981).

[6] *U.S. v. Jannotti et al.*, 501 F.Supp. 1182 (E.D.Pa. 1980); *U.S. v. Jenrette et al.*, Docket No. CR 80-00289 (D.D.C. 1980); *U.S. v. Kelly et al.*, Docket No. CR 80-00340 (D.D.C. 1980).

claim of selective prosecution and suppression of tape recordings involving Weinberg.

II. EVIDENCE AT TRIAL

The general background of the "Abscam" investigation has previously been described by this court in its opinion denying the consolidated "due process" motions (hereinafter referred to as *Myers* decision), and need not be repeated.[7] Memorandum and order of July 24, 1981. In each of the three prior cases the trial focused upon a videotaped meeting at which a congressman was offered and accepted a cash bribe. In contrast, the charges in *Williams* covered a greater time span, and involved transactions that were more complex and subtle, than the earlier cases.

Williams involved four defendants: (1) Harrison A. Williams, Jr., who is the only United States Senator to be indicted as a result of the Abscam investigation; (2) Alexander Feinberg, who was Williams' attorney, and was claimed by the government to be his "bag man"; (3) George Katz, a New Jersey businessman who was alleged to have been a co-conspirator and participant in the business deal out of which the *Williams* charges arose; and (4) Angelo J. Errichetti, who was Mayor of Camden, New Jersey, and a New Jersey state senator.

Errichetti's trial was severed under a stipulation calling for dismissal in the event his conviction in the *Myers* case is affirmed. Katz' trial was severed based on a doctor's certification that he was too ill to stand trial.[8] Consequently, only Williams and Feinberg were tried by the jury.

---

[7] In the *Myers* decision this court set forth its views on many of the issues presented by defendants in this case. Not only is familiarity with that decision assumed, but the rulings therein, insofar as relevant here, are incorporated by reference into this memorandum and order.

[8] The court has been informed that Mr. Katz is now deceased.

The charges focused upon a business transaction relating to a titanium mine in Virginia and processing plant in Georgia. Senator Williams' investment group, consisting of himself, Feinberg, Katz, Errichetti and Sandy Williams,[9] sought financing to acquire the titanium enterprise. Through Errichetti the group contacted undercover agent Anthony Amoroso and Melvin Weinberg, who posed as members of Abdul Enterprises, an investment firm pretending to represent wealthy Arab sheiks.

Attorney Feinberg organized three corporations to acquire ownership in and to operate the mining and processing venture, and the government's evidence permitted the jury to find that Williams and Feinberg each held an 18% stock interest in each corporation. Gov't ex. 19A. When the stock certificates were issued, blank certificates intended for defendant Williams' benefit were delivered to him by Amoroso in a recorded meeting at Kennedy airport on August 5, 1979. Gov't ex. 21A.

Criminality arose out of the promise requested by the undercover agent as a condition for the financing, which was that defendant Williams would promise to use his power and influence as a United States Senator to obtain government contracts for purchasing the titanium to be produced by the mine and processing plant. The government contended that defendant Williams agreed to do so in connection with two separate transactions: the stock-and-loan transaction, and the sale-of-stock transaction.

In the stock-and-loan transaction, the government's proof tended to establish that defendants organized corporations for the purchase and operation of the titanium mine and processing plant; that defendants each received an 18% stock interest in the corporations, with that of defendant Williams being hidden; that an agreement was reached between defendants and the goverment's

---

[9] Sandy Williams was a long-time friend of defendant Williams, but was not related to him.

undercover operatives whereby $100 million in financing would be provided by the Arab sheik; and that defendant Williams agreed to use his position as a United States Senator to obtain government contracts for the titanium.

In the sale-of-stock transaction the government's evidence tended to show that even before the original loan transaction could be closed, a new group of Arab businessmen were willing to buy out the entire operation provided that Williams would retain a small interest and would, again agree to use his influence as a United States Senator to obtain government contracts to purchase titanium.

Williams met with the sheik and his representatives on seven different occasions. At the final meeting, January 15, 1980, the sheik offered Williams money in return for the senator's assistance in permitting him to immigrate to the United States. Williams indicated that he was willing to assist the sheik, but he refused the money, explaining that his primary interest was in the mining venture.

For each of the two transactions the government charged four specific crimes against the defendants: bribery (18 U.S.C. § 201(c)), criminal gratuity (18 U.S.C. § 201(g)), conflict of interest (18 U.S.C. § 203), and interstate travel for unlawful activity (18 U.S.C. § 1952). In addition, the defendants were charged with conspiracy (18 U.S.C. § 371) to defraud the United States and to commit the substantive offenses of bribery, criminal gratuity and conflict of interest. As the relevant public official, defendant Williams was charged with direct violations of the bribery, gratuity, conflict of interest, and interstate travel statutes. Defendant Feinberg was charged under 18 U.S.C. § 2 with aiding and abetting Williams' commission of those offenses.

The defendants presented evidence to show, and they argued to the jury that the titanium venture was a legit-

imate business transaction, that defendant Williams never agreed to use his influence to obtain government contracts, that neither defendant intended to violate any statute, that there was no conspiracy either to defraud the United States or to violate any of its laws, and that the defendants were the victims of entrapment.

In addition to the audio tapes, the videotapes, and the testimony of the government agents, the government presented the testimony of Sandy Williams, who testified for the government under a grant of immunity, and a number of other witnesses. Defendants sharply attacked the credibility of Sandy Williams and of the government agents, and urged the jury not to draw from their testimony the inferences suggested by the government.

Both defendant Williams and defendant Feinberg testified and offered explanations of their conduct as it had been recorded on the tapes. Through counsel and, in part, by their own testimnoy, Williams and Feinberg argued that they had been entraped into committing whatever crimes had been committed.

III. THE JURY'S VERDICTS

The ultimate choice of inferences depended to a large degree upon the jury's resolution of the credibility questions. From the verdicts it is apparent that the jury believed neither defendant Williams nor defendant Feinberg, and that is basically accepted the testimony of Sandy Williams as well as the government's interpretation of the tapes. Viewed in that light, the guilty verdicts on all but one count are amply supported by the evidence. Under the court's instructions, with the one exception discussed in section VI, *infra*, the jury's verdicts of guilty against all defendants on all counts established the essential elements of the crimes charged.

On the bribery count that was based on the stock-and-loan transaction, 18 U.S.C. § 201(c), the jury found

that defendant Williams received and agreed to receive stock in the titanium mine venture plus the promise of a loan from the sheik to finance the venture; that he received the stock and loan promise in return for being influenced in his performance of an official act, namely, to use his influence as a United States Senator with officials in the executive branch of the United States government and with other United States senators to obtain government contracts for the titanium mine; that when he sought the loan and received the stock defendant Williams intended to use the influence of his position to get government contracts; that defendant Williams acted knowingly, willfully, and corruptly; and that he was not the victim of entrapment because he was predisposed to commit the crime of bribery.

Three key issues were highlighted for the jury: (1) What was Williams' intent in accepting the stock and seeking the loan? (2) Did he act corruptly? and (3) Was he predisposed to commit the crime? On each of these issues the jury rejected Williams' own testimony and, based on the circumstantial evidence before them, determined that each of the elements had been established beyond a reasonable doubt.

On the criminal gratuity count, 18 U.S.C. § 201(g), the jury was asked to analyze the same facts from the point of view of the criminal gratuity statute. Many of the essential elements of criminal gratuity duplicated those of bribery. The significant difference was that the jury found that defendant Williams received, or agreed to receive, the stock for or because of an official act to be performed by him.

On the conflict of interest charge, 18 U.S.C. § 203(a), the jury found that the loan and stock was compensation that Williams received or agreed to receive in return for services to be rendered by him in relation to obtaining contracts from the government for the purchase of ti-

tanium. The jury, of course, also found that in doing so he acted knowingly and willfully, and was not the victim of entrapment.

On the interstate travel count, 18 U.S.C. § 1952, the jury found that on August 5, 1979 defendant Williams travelled from New Jersey to the Northwest Airlines terminal at John F. Kennedy International Airport in New York State; that he did so with the intent to carry on or promote the unlawful activity of receiving a bribe; that while he was at JFK airport he accepted delivery of the stock certificates; that he acted knowingly and willfully; and that he was not the victim of entrapment.

With respect to the sale-of-stock transaction which is the subject of counts 6 through 9, the jury's findings were necessarily similar to those on counts 2 through 5 pertaining to the stock-and-loan transaction, except that the "thing of value" and "compensation" received by Williams was the promise of a second group of Arab businessmen to purchase the venture outright, and the corrupt conduct of defendant Williams consisted of a repetition to the new group of the same promise, *i.e.*, that he would use his influence to obtain government contracts for the titanium. The interstate travel occurred on September 11, 1979 when defendants Williams and Feinberg and others travelled to Kennedy Airport to meet with Amoroso, Weinberg and others to discuss the sale of the stock.

In the substantive counts, 2 through 4 and 6 through 8, defendant Feinberg is charged as an aider and abettor, and the jury's verdicts determined not only that defendant Williams was guilty of the underlying crimes, but also that defendant Feinberg willfully joined in and assisted defendant Williams in committing each of those crimes. The jury also determined that defendant Feinberg was not the victim of entrapment on any of the substantive counts.

Feinberg was also charged as an aider and abettor in count 5; here, the evidence before the jury does not support a guilty verdict. *See* section VI, *infra*. In count 9 Feinberg in charged directly with a Travel Act violation for his travel to Kennedy Airport on September 11, and the evidence supports the jury's verdict of guilty on this count.

On the conspiracy count, 18 U.S.C. § 371, the jury necessarily found that there was a conspiracy of the type charged in the indictment, that both of the defendants willfully became members of the conspiracy, that specified overt acts were committed during their membership in the conspiracy, and that defendants were not the victims of entrapment.

IV. DEFENDANT'S ARGUMENTS

On these motions defendants incorporated all of the arguments urged in the *Myers*, *Lederer* and *Thompson* cases, and advance additional specific arguments in support of their own unique due process contentions. Defendant Williams argues that he was entrapped by the government agents, who through extraordinary lures and pressures induced him to commit the offenses charged; that evidence of his predisposition is lacking as a matter of law; that as a matter of statutory construction Congress did not intend for these defendants' actions to constitute a crime; that considered as a whole the government's conduct was so outrageous as to require dismissal of the indictment; that the court's charge effectively prevented the jury from considering the entrapment issue; that the audio tapes and videotapes forming the background for the government's case were erroneously admitted into evidence; and that defendant Williams was the victim of selective prosecution by the government. Williams has also filed a separate brief in support of motions for judgment of acquittal or a new trial wherein he asserts that prosecutorial misconduct

and erroneous introduction of similar act evidence warrant the relief requested.

Defendant Feinberg's main argument is that as a matter of law on the evidence adduced at trial the government failed to prove Feinberg's predisposition to commit a crime. Feinberg's contention, which was vigorously pressed at trial to both the court and the jury, is that the government's inducements were so overwhelming that it is impossible for the government to prove beyond a reasonable doubt Feinberg's predisposition. Feinberg also urges that the similar act evidence concerning the Ritz casino transaction was erroneously admitted at trial and was so prejudicial as to deprive him of a fair trial. Finally, Feinberg contends that the trial record lacks any evidence to support his conviction of the Travel Act's violation charged in count 5.

V. MOTION TO SUPPRESS TAPES

Defendants urge that all of the tapes of the voices of defendant Williams and defendent Feinberg should have been excluded from evidence because under the circumstances here they constituted an unreasonable search and seizure. The government's first response is that defendants have not preserved their fourth amendment claims by filing an appropriate pretrial motion. The government is correct to the extent that defendant Williams' pretrial motion to suppress all tape recordings involving Weinberg relied on the court's general supervisory powers rather than on any claimed fourth amendment violation. F.R.Cr.P. 12(b)(3) requires that any motion to suppress evidence be made before trial; F.R.Cr.P. 12(f) provides that the failure to make such a motion constitutes waiver.

Recognizing the limitations on the timeliness of suppression motions imposed by Rule 12, defendant Williams contends that cause has been shown for relief from the waiver, F.R.Cr.P. 12(f), and that because he is making

a novel fourth amendment claim the normal rule should not apply. Along these same lines defendant Williams asserts that the magnitude of the surreptitious taping directly affects defendants' due process rights, an area expressly reserved for post-trial resolution.

To the extent Williams' argument is based on fourth amendment grounds, the court agrees with the government that the failure to file a pretrial motion constitutes a waiver. To the extent Williams' current motion relies on "due process" considerations, it is lacking in merit.

While he grudgingly acknowledges that consensual recordings have, as a matter of precedent, escaped the exclusionary rule, *U.S. v. White*, 401 U.S. 745 (1970), the new counsel for defendant Williams argues that when so many tapes are used, the cumulative effect becomes unreasonable and, therefore, unconstitutional.

A cynic might characterize defendants' argument as urging that while a little "truth" is permissible, large quantities of "truth" are unconstitutional. For present purposes, however, it is sufficient to comment that there is no authority for the novel contention advanced by new counsel for defendant Williams, and this court concludes that the argument is as wanting in logic as it is unsound in principle. As pointed out in the *Myers* decision, the quality of evidence produced by tape recordings, particularly by the videotapes in the Abscam cases, far exceeds the sketchy, imperfect evidence availabe in the usual trial based upon witnesses' unaided recollections. The motion to suppress the tapes on the ground that there were too many of them is, therefore, denied.

VI. INSUFFICIENCY OF EVIDENCE TO SUPPORT FEINBERG'S CONVICTION ON COUNT 5

Defendant Feinberg contends that the record is "completely barren" of any evidence to support his conviction for aiding and abetting defendant Williams' travel

to JFK International Airport on August 5, 1979, where Williams met with Amoroso and Weinberg and accepted shares of stock from them. Gov't ex. 21A. Feinberg argues that the record shows that only Errichetti and Sandy Williams were involved in arranging the meeting at the airport between defendant Williams and the government agents.

In support of the verdict the government points only to defendant Williams' testimony concerning conversations he had with defendant Feinberg about transfer of the shares of stock. After reviewing the evidence in the case and particularly the portions of the transcript relied upon by the government, the court concludes that the evidence supporting Feinberg's knowledge of defendant Williams' travel in interstate commerce to further the illegal transaction is ambiguous at best. While the record does indicate that discussions about transferring the stock took place between Williams and Feinberg, there is no evidence that Feinberg had any hand in arranging either the meeting at Kennedy Airport that eventually occurred or the interstate travel that led to the meeting. Tr. at 4641-42.

Defendant Feinberg's motion on count 5 for judgment of acquittal pursuant to F.R.Cr.P. 29(c) is therefore granted.

VII. CLAIMED ENTRAPMENT

Defendant Williams advances several arguments relating to the entrapment defense. To the extent that it asserts that the government agents' conduct toward defendant Williams was improper, the argument goes to the issue of "outrageousness" which is discussed in section VIII of this decision. To the extent that these arguments focus upon the philosophical nature of entrapment and its general relationship to the problems of governmental misconduct, they were reviewed and decided in the

Myers decision. No new arguments in this area are advanced by defendant Williams, and his rehash of the general issue has not persuaded this court to change its view of the present state of the law relating to "objective entrapment" as expressed in *Myers*.

Two arguments are advanced, however, that deal with specific entrapment issues in this case. Defendant Williams argues, first, that the court's instructions to the jury on the issue of entrapment were erroneous, and second, that the evidence was insufficient for the jury to find he was predisposed to commit the crimes charged.

The first argument, relating to the jury instructions, contends that the court took the issue of predisposition away from the jury. This argument seizes upon one sentence in an unrelated section of the charge, presents it out of context, and concludes that the predisposition question was withdrawn from the jury.

Such a strained construction of the charge not only ignores the overall structure of the charge, but also ignores the specific issues that were given to the jury in the form of the essential elements of the crime. On each count of the indictment the jury was instructed that in order to find the defendant guilty they would have to determine that the government has established beyond a reasonable doubt that the defendant was not the victim of entrapment. As explained to the jury, entrapment is made up of two parts, inducement by government agents to commit the offense, and no predisposition by the defendant.

The jury was further instructed that "the term entrapment means that law enforcement officials, acting either directly or through an agent such as Melvin Weinberg here, induced or persuaded an otherwise unwilling person to commit an unlawful act." Tr. at 5572. The court next pointed out some of the inducements presented by the government to defendants and turned the jury's

attention specifically to the question of predisposition. Specifically, the court stated:

> Under the law of entrapment, therefore, that leaves for you, the jury, to determine as the decisive question on this entrapment issue whether the defendant was predisposed to commit the crime; that is, whether he was ready and willing to commit a crime such as charged here whenever a favorable opportunity was offered. Tr. at 5574.

The court then reviewed several of the conceptual and evidentiary problems that the jury would have to consider in determining whether or not a defendant was predisposed. That review covers approximately 5½ pages in the record. Tr. 5574-5579.

Later, after completing its discussion of the essential elements of the nine counts of the indictment and after a review of certain specific evidence problems, the court turned to a general wind-up intended to place matters in an overall perspective. The first three paragraphs of that discussion read:

> It is important, ladies and gentlemen, that you focus on the precise issues before you. As I said at the beginning, the defendants are on trial in this case for the specific counts of this indictment. One count of conspiracy, two counts each of bribery, criminal gratuity, conflict of interest and interstate travel for wrongful purposes.
>
> What the FBI agents and Mr. Weinberg did should concern you only to the extent that you find that it affected the conduct and state of mind of a defendant or other participants in the conspiracy or only insofar as it may affect the credibility of any witness with respect to the matters before you.
>
> *You are not to be concerned with whether the prosecution of the FBI agents or Mr. Weinberg acted*

> *legally or illegally, properly or improperly or whether the Abscam investigation itself was conducted properly. Those are questions which must be decided by me at an appropriate time,* but except in assessing credibility here, not questions which should affect your determination of the facts in this case or the guilt or innocence of these defendants, your central focus must be upon what the defendants did and what they thought.

Defendant Williams contends that the underscored portion of the above passage in effect took the predisposition question away from the jury and emasculated his predisposition defense. Both in its immediate context and in the overall context of this lengthy charge, it appears to this court to be unrealistic for defendant to suggest that the jury could in any way have inferred from the underscored language a direction either that they were not to consider defendants' predisposition or that they were to automatically conclude that the entrapment element of each offense had been negated beyond a reasonable doubt. Defendant Williams' motion on this ground is therefore denied.

The second question on predisposition raised by defendant Williams is whether there was sufficient evidence from which a jury could reasonably find predisposition. In substance, defendant Williams argues that the record establishes that he was not predisposed to criminal conduct of any sort, and that it is unquestionably true that when his name came up in the Abscam investigation the government had no reason to suspect him of criminal conduct.

However, at the very beginning when Errichetti approached Weinberg about a possible loan for a business venture in which defendant Williams was interested, considerable doubt was cast upon Williams' position. As early as March, 1979 there had been presented to the Abscam investigators, at defendant Williams' initiative,

a proposed business venture whose principals included a businessman with a known criminal background (Katz), a grossly corrupt local politician (Errichetti), a lawyer (Feinberg) who was advertised by one of his own co-venturers as a "bag man" and who showed he was willing, if not anxious, to pay and receive bribes, provided they were called "fees". All three of them were enthusiastically pushing a titanium mine in which a United States Senator (Williams) had a hidden interest.

In its brief the government reviews in some detail the extensive evidence at trial from which the jury could properly find predisposition. While the court does not agree with the government's characterization of that evidence as "overwhelming", it does view the evidence as sufficient to support the jury's findings beyond a reasonable doubt that both defendants were predisposed.

Considering that evidence in the light most favorable to the government, and resolving credibility issues in favor of the government and against the defendant, as required by the applicable precedents, *e.g.*, *Glasser v. U.S.*, 315 U.S. 60, 80 (1942), the jury could have found that for an extended period of time defendants Williams and Feinberg had used Williams' influence and position in attempts to enrich themselves; that, specifically, this was done in connection with the Biocel and Ritz projects; that Feinberg was Williams' "bag man";[10] that on May 31, 1979 when first asked if he would seek government contracts for titanium, Williams said that he would "try"; that later, at least twice, he specifically agreed to use his influence to obtain government contracts for the titanium; that Williams was willing to receive cash in "expense money" as long as it did not pass to him directly; and that together Williams and Feinberg sought to conceal

---

[10] *See* discussion in section IX-D.

Williams' involvement in the titanium mine by use of a "blind trust".

Defendant Williams also urges that the "pre" in "predisposition" requires as a matter of law that a defendant's inclination to commit a crime must exist before he has any contact with government agents. This argument can be viewed on two levels. As part of the "outrageousness" argument, it urges that before any investigation may begin, the government must have evidence that its eventual target was predisposed to commit a crime. This argument is discussed in the "outrageousness" section.[11]

On a different level, defendants' argument could be viewed as requiring that the jury, when it determines "predisposition", focus not upon the time when the crime was commited, but upon the time when the government's investigation began. On a conceptual level, the court rejects this argument. The relevant time for determining predisposition cannot be so precisely focused. Evidence of everything that happened before final completion of the crime was relevant, but ultimately, it was for the jury to determine under the instructions given here whether the defendants were predisposed, that is, whether they were otherwise innocent persons who were enticed, induced, persuaded, or lured to commit the crime, or whether they were ready and willing to commit such a crime whenever a favorable opportunity was offered. The jury found that the agents did not induce an innocent person, but did no more than furnish a convenient opening for criminal activity in which defendant Williams and defendant Feinberg were prepared to engage.

Defendant Williams comments that in the *Myers* decision this court seems to have "written off" the predisposition concept as a matter of law. This argument reflects misunderstanding of the issues in *Myers*. That de-

---

[11] *See* discussion in section VIII-D.

cision dealt with seven defendants in three cases. Except for some due process overtones, entrapment was not raised by the four defendants in *Myers* nor by the two defendants in *Murphy*. In those cases there was no request to charge on the issue, and the government did not present evidence on the issue.

Only with Congressman Lederer were entrapment and predisposition made issues for the jury's determination. With Lederer, there was very little evidence of the defendant's earlier activities. The jury was asked to determine predisposition largely from evidence showing Lederer's knowledge of the purpose of the meeting and his response to the bribe when it was offered. The instruction on entrapment given there was similar to the one presented to the jury here; it focused primarily on the predisposition question, and it asked the jury to determine from all the circumstances whether or not Congressman Lederer was predisposed to accept the proffered bribe.

Consequently, while predisposition was not a major concern in the *Myers* due process decision, this court by no means "wrote it off" as a potentially significant legal issue under proper circumstances. Such proper circumstances were certainly present as to defendants Williams and Feinberg here, and on substantial evidence the jury determined the issue against them.

VIII. CLAIMED OUTRAGEOUSNESS

Defendants contend that numerous incidents of governmental misconduct, either singly or in combination, place this case at the "demonstrable level of outrageousness" that the Supreme Court has suggested might warrant dismissal of charges even where proof of a defendant's predisposition to commit a crime defeated his claim of entrapment. *Hampton v. U.S.*, 425 U.S. 484 (1976). The instances of misconduct relied upon are discussed below.

A. *The "Coaching" Incident.*

Much ado is made about the so-called "coaching" episode on June 28, 1979, where Weinberg is said by defendants to have put words in defendant Williams' mouth and thereby prevented him from speaking his own mind at the meeting with the sheik that followed immediately thereafter. In that taped conversation, Weinberg told Williams that the sheik was interested in hearing how "high" Williams was in the Senate, Gov't ex. 14A at 2; whom Williams knew who could do favors for the business venture, *id.*; and how Williams would use his influence and importance to obtain government contracts, *id.* at 3-4. Weinberg also told Williams that his conversation with the sheik would be "all talk, and bullshit", *id.* at 5, that he just had to "play, blow his horn, and mention names", *id.* at 6, and that Williams would merely be "on stage for twenty minutes", *id.* at 7.

The videotape of Williams' meeting with the sheik includes statements by the senator of his importance within the senate and his influence with the president, as well as with numerous other governmental officials. Gov't ex. 15A at 7-8. When asked by Amoroso whether he would be able to secure government contracts if the sheik agreed to finance the mining venture, Williams replied, "no problem, * * * it will come to pass." *Id.* at 9. To the jury the government argued that this tape demonstrated defendant Williams' complete and willing commitment to using his position corruptly to secure government contracts for the titanium venture.

Although Williams now asserts through new counsel that Weinberg and Errichetti had placed upon him extraordinary pressures that induced him to make certain uncharacteristic, if not involuntary, statements and to acquiesce by his silence in statements made by others, Williams' own trial testimony simply does not support his new attorney's argument. At trial Williams' own attorney exhaustively questioned him about the effect of

Weinberg's suggestions and comments. Tr. at 4297-4389. When asked by his attorney on his direct examination to explain his reaction to Weinberg's statements, Williams explained that "it was offensive but it didn't mean a great deal to me to tell you the truth." Tr. at 4299. This statement was a consistent theme of Williams' testimony concerning the "coaching" incident:

> He [Weinberg] wanted me to talk about my importance. That's what he wanted. *And I just thought I would go up there and talk about what I thought was important*, and that's what it was all about basically, this enterprise of mine in Virginia. Tr. at 4306 (emphasis added).
>
> • • • •
>
> Q. Senator, now Weinberg is saying to you clearly, government contracts, using your influence. And all you are saying here is um-hum, gotcha, um-hum, um-hum. What were you thinking when this was going on?
>
> A. What I started to develop a moment ago, while he's going on this way I was thinking of what I was going to develop when I got upstairs. • • • *but there can be no exaggeration, no statement of things I know I could not do, would not do* in no shape was I going to be associated with, even in a baloney sense as they called for, and that was a contract. Tr. at 4307 (emphasis added).
>
> • • • •
>
> Q. Did you ever say you are the man, you are going to open the doors, you are the man who is going to do this, to use my influence, and I guarantee this?
>
> A. No.
>
> Q. Did you ever guarantee anything?
>
> A. Absolutely not. Tr. at 4309.
>
> • • • •

And I knew I was not going to say anything about any of that because it had not—I had not been involved. * * * and *I know I was not going to say anything about it.* Tr. at 4310 (emphasis added).

* * * *

I don't know. I was thinking about going upstairs. *I didn't listen intently to every word that Mel was saying,* I'll tell you.

Q. What about you're onstage for 20 minutes, the most expensive TV star that ever got paid. What did that mean to you, sir?

A. This meeting—it is an important meeting. And that's all that I got out of that. Tr. at 4316 (emphasis added).

* * * *

It-I think I said yesterday, *this is not for me, what he's talking about,* that kind of effort to impress the Sheik. *I was going to do it my way. So, I didn't really concentrate on that which was meaningless to me.* I knew what the purpose of the meeting was to try to impress the Sheik. Tr. at 4328-29 (emphasis added).

Williams also testified that contrary to Weinberg's and Errichetti's instructions, he decided to discuss the mine with the sheik:

He [Errichetti] told me not to talk about the mine. I was going to do that—

Q. Did you do that eventually?

A. I certainly did. Tr. at 4329.

* * * *

Q. Why did you begin by talking about the mine which is exactly opposite what Errichetti and Weinberg told you?

A. The only reason this was all coming about, this meeting, as far as I was concerned, was because of

the mine. That was our reason for being together. Tr. at 4332.

At trial, Williams' position was essentially that the videotape did not incriminate him, but the jury obviously rejected his argument. Now, Williams asserts that the incriminating statements he made on videotape were the product of coaching; but his sworn testimony unequivocally establishes that his statements and action on camera were voluntary and intentional. They cannot be dismissed as merely the product of Weinberg's urgings.

The claim of prejudice from Weinberg's and Errichetti's "coaching" is advanced by Williams' new counsel who appeared in the case to argue the "due process" issues. As already demonstrated, Williams testified at trial that he was not influenced by Weinberg's statements. At the post-trial due process hearing, Williams did not testify and retract his trial position. What we are left with, then, is simply an attorney's argument that lacks foundation in the record.

Moreover, Williams could not reasonably complain that he was duped by Weinberg and Errichetti to the point of innocently acquiescing in the proposed illegal bribery. Several time Errichetti and Weinberg had told him that in order to get the loan from the sheik he would have to tell him he had the political connections and power to produce government contracts for the purchase of titanium. There is no way that Williams could have misunderstood what was proposed: an offer of Williams' "power and influence" to obtain contracts in order to induce the sheik to grant the loan. Williams' fine educational background, his long political experience, the heights to which he had risen in the councils of government, all argue overwhelmingly against any claim that people such as Errichetti and Weinberg could "put words in his mouth" or make him say things that he did not mean or did not want to say. The court finds that the conduct toward Williams of the government agents and

of Weinberg with respect to the June 28, 1979 meetings was not "outrageous".

The court further finds that despite the prompting and "coaching" by Errichetti and Weinberg before his meeting with the sheik on June 28, 1979, defendant Williams acted voluntarily and intentionally in that meeting and was not influenced to say or do anything that he had not previously agreed to say and do; consequently, Williams was not prejudiced by the conduct of Weinberg and Errichetti. Absent demonstrable prejudice to Williams, dismissal of the indictment is unwarranted. *U.S. v. Morrison*, 449 U.S. 361 (1981); *U.S. v. Payner*, 447 U.S. 727 (1980).

B. *Timing of Interruptions.*

Williams contends that the government deliberately interrupted his conversation with the sheik on January 15, 1980 when Williams was about to explain why he did not want money in return for immigration help. The January 15 meeting had been arranged by the agents in order to give the sheik an opportunity to discuss with Williams the sheik's desire to immigrate to the United States. In a scene partially reminiscent of the other Abscam cases, Williams was bluntly offered money in return for his promise to assist the sheik's entrance to the United States. Williams, however, rejected the money offer. Gov't ex. 25A at 8-9. As Williams began to explain the basis for his refusal, Amoroso entered the room and told the sheik that a phone call had arrived for him. Moments later, the phone rang and the sheik excused himself from the room.

Defendants urge that the interruption evidences the government's determination to prosecute Williams at all costs. The government was so determined, the argument goes, that Amoroso was deliberately sent into the room to prevent Williams from explaining on tape his refusal of the money.

There are several reasons why this argument is without merit. In the first place, the interruption was anticipated long before the talk turned to bribery. The videotape clearly shows that even before the sheik and Williams were left to discuss matters alone, Amoroso told the sheik that he would be interrupting the meeting with an anticipated phone call. *Id.* at 2. Secondly, defendant's argument assumes that there was to be an interruption only in the event that Williams declined the bribe offer, but the assumption is unsupported by any evidence.

Moreover, Agents Amoroso and Good testified at trial that the decision to send Amoroso into the room to interrupt the meeting was made before Williams had refused the offer of money. The testimony of Thomas Puccio at the due process hearing corroborates Amoroso's and Good's version, and the court finds their explanation believable. Finally, even if the evidence substantiated defendants' "intentional interruption" hypothesis, there was no prejudice to Williams because Williams was given the opportunity to refuse the money on videotape, and not only did so, but also explained why. *See Payner* and *Morrison*, *supra*.

The significance of the interruptions was vigorously argued to the jury by defense counsel, who contended that Williams' refusal of the cash bribe proved his general innocence and his lack of predisposition. The government argued that the videotape confirms Williams' interest in the mining venture, and his desire to have it succeed.

It is true that the tape clearly shows that Williams rejected an offer of money in return for immigration aid to the sheik. But the tape also shows that the interruption did not disrupt Williams' explanation of his position, for when the conversation and the tape resumed, Williams immediately picked up the same subject and stated in substance that what he wanted from the sheik was not

a cash payment, but the sheik's financing for the titanium project. Williams said:

> No, the er, my interest is with my associates. To, to see this very valuable mining area, er, appropriately developed. It's doing nothing now. There is the, there is the ore, there's the titanium. There is the iron. There is the phosphorus. All of them are needed and yet nothing is happening. So *my only interest is to see this come together.* And the, and the, the elements that I can help with, your, *your personal situation.* Er, I am very, *I find it, er, a desirable thing to do for you, personally. And it's part of creating something of value, bringing in that ore.* Gov't ex. 25A at 9 (emphasis added).

C. *Internal Governmental Memorandum.*

Defendants argue that because an internal FBI memorandum of November 27, 1979 suggested that the case against Williams was then incomplete,[12] and because Williams thereafter refused to accept a cash bribe on January 15, 1980, the government itself has already conceded that Williams did not commit any crime and that the indictment, therefore, should be dismissed. Merely because some government employees were not overly impressed with the strength of the Williams case as of November 27, 1979, does not mean that the government was precluded from testing the sufficiency of its evidence before the grand jury in obtaining an indictment, or from convincing a petit jury of defendants' guilt beyond a reasonable doubt. For the government to be bound by internal

---

[12] That memorandum is annexed as exhibit A to brief in support of motions for judgment of acquittal or new trial, and was marked as an exhibit at the consolidated due process hearing in *Myers.* DP 73 (Headquarters file, doc. 233). Since the prosecutors' opinions reported therein were irrelevant to the jury's deliberations, the memorandum was not required to be disclosed to defendant at trial. *See also* discussion in section IX-C.

preliminary evaluations of the strengths and weaknesses of a particular case would discourage prosecutors from ever acknowledging that a particular facet of a case was potentially weak or needed further evidence or might require careful handling at trial. Rather than discouraging careful preindictment evaluation of a case, however, the governing rules should encourage a prosecutor to thoroughly and vigorously evaluate all of the available evidence not only to prevent unnecessary trials but also to ascertain and strengthen potential weak spots which might later permit a guilty suspect to avoid conviction.

The court concludes that the existence of the November 27, 1979 memorandum suggesting that further specific proof be adduced of Williams' criminal propensity before seeking an indictment against him does not preclude the government from proceeding even when the additional evidence is not forthcoming.

D. *Selective Prosecution.*

Defendant Williams moved pretrial for dismissal of the indictment on the ground that he was the victim of selective prosecution. The court reserved decision on the motion in order to consider it post-trial in light of evidence that would develop at trial and in the post-trial "due process" hearing. Wiliams now reasserts the motion, although the basis for the contention has shifted somewhat.

Originally, Williams contended that he and other Abscam defendants had been singled out for prosecution because they had supported Edward Kennedy for the Democratic nomination for president rather than the then incumbent, Jimmy Carter. Now, by letter to the court dated October 23, 1981, Williams' attorneys state that the claim is

> not so much that Kennedy supporters were targeted but rather that certain people were given the honesty

test and others, who may have been targeted by lower level government agents, were not so tested either as a result of orders from superiors or tipoffs to them as to the scam. It appears that to a large degree those people were supporters of then President Carter.

Williams contends that he is now entitled to still a further hearing on the issue. Evidence has already been presented on this question, both in the original motion papers, which included some of the testimony of Brewer before the Senate Judiciary Committee, and by witnesses at the due process hearings. On the basis of that evidence the court finds that Williams was not singled out for prosecution, nor was he "negatively selected" through the failure of some justice department official to tip him off that he was under investigation. If such a leak occurred with respect to some other potential targets, as intimated by Brewer's testimony, that leak did not reflect justice department policy, but instead was the result of misconduct by some individual in the department.

The court further finds that there were no orders from superiors directing the investigators to focus upon particular individuals, nor were there any orders forbidding them from pursuing any leads that the investigation opened up. The court further concludes that Williams was not the victim of selective prosecution; on the contrary, his prosecution was the natural outgrowth of his initial joining with Errichetti to seek financing for the titanium mine from the undercover operatives.

Defendant Williams has brought no additional information to the court's attention which would warrant still more hearings under the principles described in *U.S. v. Berrios*, 501 F.2d 1207 (CA2 1974), nor is there any claim of evidence that was newly discovered since the due process hearing in June, 1981. Consequently, defendant Williams' motion for a further hearing on this question is denied.

E. *Amount of Inducement.*

Both defendants, but Feinberg in particular, urge that the amount of the inducement offered to defendants was so great as to constitute entrapment as a matter of law and "outrageousness". In the stock-and-loan transaction the inducement was not an outright payment to the Williams group, but instead was a loan that was sufficient to fund the purchase and initial operation of the titanium mine and processing plant. Interest was required to be at the prime rate, and the loan was expected to be repaid. If the inducement was excessive to the defendants, it could have been only because they realized that the financial potential of the mine and plant did not justify such a loan. Since no personal guarantees were asked for, this would mean that more money was to be advanced to defendants than they ever expected to repay. Such a fradulent intent the court does not find.

On the contrary, the court agrees with defendants that they viewed the mine and processing plant as legitimate business acquisitions.[13] Considering the extent of the real estate to be acquired, the apparent value of the ore deposits, and the production potential of the processing plant, it cannot be said that as a matter of law the amount of the offered loan, the inducement, was outrageous, excessive, or unreasonable.

On the sale-of-stock transaction it was proposed that the Williams group "roll over" their investment in the mine and processing plant by selling the package to a different Arab businessman for the price of $170 million. Out of that, of course, the initial $100 million to be advanced by the first sheik would have to be repaid. The ap-

---

[13] As mentioned above in section II, defendants' criminal conduct arose out of their willingness to use and promise defendant Williams' influence and public position as an aid in getting government contracts for the output of an otherwise legitimate mining enterprise.

parent profit before taxes to defendants Williams and Feinberg would have been approximately $10 million each. Unquestionably, that is a substantial sum of money. In this court's view, however, for people such as defendants Williams and Feinberg who live and work in the top echelons of our society, the sum is not so excessive as to exonerate them from criminal responsibility in accepting the bribe.

F. *Miscellaneous Instances of "Outrageous" Conduct.*

Other instances of "outrageous" governmental conduct urged by defendants include Errichetti's forgery of defendant Williams' signature to a letter, Weinberg's alleged forgery of certificates of deposit that he provided to William Rosenberg, the FBI's agreement with the Chase Manhattan Bank for the bank to tell anyone who inquired that the sheik had a substantial deposit, and the use of an informant such as Melvin Weinberg in any investigation. The government's use of Weinberg, the Rosenberg certificates of deposit, and the Errichetti forgery have been fully discussed in the *Myers* opinion. *Myers* opinion 527 F.Supp. at 1235, 1240-1242. They need not be reviewed again, and they do not form a basis for dismissal of this indictment. Nor does the Chase Manhattan Bank's "gross deception", Williams memorandum at 46, affect the due process rights of these defendants, who do not even claim that they had direct knowledge that the sheik's funds were on deposit until after knowledge of the Abscam investigation became public.

G. *Cumulative Effect.*

Defendants have argued not only individual instances of claimed outrageous conduct by the government, but they also urge that, when combined, the various instances have a cumulative effect which amounts to outrageousness. The court is not convinced. As indicated above, many of de-

fendants' arguments are not factually supported by the record; other instances that did occur did not prejudice any rights of the defendants. Whether viewed as separate instances or in its totality, the conduct by the government during its investigation does not constitute outrageousness that would require dismissal of the indictment under applicable Supreme Court precedents.[14]

IX. CLAIMED MISCONDUCT BY GOVERNMENT AT TRIAL

Defendants urge several points designed to show that the government engaged in persistent misconduct during the course of the trial.[15] They urge that the government improperly introduced evidence of the activites of defendant Williams with respect to the Ritz Casino and a permit for the Biocel Corporation; they argue that the government intentionally misrepresented at trial the purpose for introducing a second group of Arab businessmen to purchase the titanium venture; they object to the prosecutor's references to defendant Feinberg as defendant Williams' "bag man"; and they criticize certain comments made during the government's summations.

---

[14] It should be noted that to a significant extent, defendants are really urging the court to adopt an objective view of entrapment, in violation of controlling precedent. This the court has previously refused to do, and still refuses. Defendants Williams and Feinberg urge two specific claims. (1) Was the government's conduct "outrageous"? and (2) If not, did the government establish beyond a reasonable doubt that defendants were predisposed to commit the crimes? In section VII the court answers the "outrageousness" question in the negative. At trial the jury found predisposition, that negated entrapment, and in section VII of this decision the court finds the evidence supporting the jury's finding of predisposition to be legally sufficient.

[15] These arguments are to be distinguished from defendants' "outrageousness" argument, discussed in section VIII, which is directed at claimed misconduct during the course of the investigation.

A. *Ritz Casino Evidence.*

Defendants argue that evidence of their involvement in obtaining a permit for the Ritz Casino was improperly offered for two reasons. In the first place, they contend that the evidence could not show *pre* disposition since it occurred in 1979, *after* the investigation had begun. Assuming that the titanium mine and Ritz Casino projects proceeded simultaneously, nothing in the law of entrapment would preclude at the titanium trial evidence of defendant Williams' other attempts to use influence on public officials, whether made before, during or after the titanium events. Logically, such evidence is relevant to Williams' state of mind; absent a claim that somehow the Abscam investigators also induced defendant Williams' overtures to members of New Jersey's Casino Control Commission, a claim not made here, such conduct is legally admissible to show defendants' motive, opportunity, intent, preparation, and method of operation. F.R.E. 404(b).

Secondly, defendants argue that it was improper for the government to use evidence of Williams' activities with Lordi, because the government had in its files memoranda acknowledging that the officials in New Jersey had been unable to corroborate or confirm the investigative lead. This argument conveniently overlooks, however, the source of the evidence that Williams and Feinberg attempted to influence a decision by the Casino Commission. That evidence was a taped conversation in which Williams and Feinberg told of, indeed, bragged of their contacts with commission members and of the results which had followed. Gov't ex. 24A. It may be that the commission members that were claimed to have been approached, do actually deny that the events occurred. It may also be that in a prosecution against the commissioners there would be insufficient evidence to establish guilt. The government's evidence here, however, consisted of direct admissions by Williams and Feinberg,

admissions made under circumstances that were designed to impress the listeners with their know-how, their awareness of political reality, their ability to achieve results, and their willingness to use the Senator's influence for financial gain. In such circumstances there is no unfairness in using the defendants' own voluntary statements as evidence against them.

In one of their memoranda, Plaza and Weir analyzed the evidence about Williams' participation in the Ritz Casino application. DP ex. 24. At page 9 they conclude: "there is no evidence that Williams made such inquiry or recommendation to Lordi." Of course, Plaza and Weir did not have the benefit of Williams' trial testimony that he "thought" he had contacted Lordi on the subject; but in concluding that there was "no evidence", they do seem to have disregarded that Williams and Feinberg jointly made the videotaped admissions.

Evidence of the Ritz Casino activities was relevant on the issue of defendants' predisposition at the trial. In a conference whose record was sealed, the court explained its evaluation of the arguments under F.R.E. 403 and 404(b); there is no need to repeat that evaluation here. In sum, however, defendants did not establish that the relatively high probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

B. *Biocel Evidence.*

In a similar vein, although of less dramatic impact, was evidence about defendant Williams' attempting to use influence with certain local officials in connection with obtaining a permit by the Biocel Corporation in which defendant Williams had an undisclosed interest. Since those transactions were not tape recorded there were sharp questions of credibility over this issue. Assuming the government's evidence to have been true, however, the legal analysis here is simlar to that with respect to the Ritz Casino, and under the balancing test

required by FRE 403, the evidence was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice.

Defendants also argue that the government failed to fulfill its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), in conection with the Ritz Casino and Biocel matters. The flaw in this argument, however, is that defendants were already aware of any material that would have been admissible in evidence. The argument is directed to prosecution memoranda and claims that investigations by other governmental agencies failed to produce indictments in those maters. Evidence of the prosecutors' opinions is not admissible, nor would be memoranda embodying those opinions. The witnesses who were involved in the activities were known equally to both sides. Since the government's claim with respect to the two transactions was also known to defendants, the witnesses who could have testified on the issues were equally available. In fact, defendant Williams did call some witnesses to testify on the transactions. Consequently, the argument based on *Brady* is rejected.

C. *The Purpose For the Resale "Stall".*

Pointing to the government's opening statement, defendant Williams claims the prosecution invented a story of a "fictitious stall" to explain why the investigation of defendant Williams continued after he took the stock certificates on August 5, 1979. The undercover operators had promised a loan of $100 million, which, of course, they did not intend to produce. According to the government, the Abscam investigation was continuing in other areas and, therefore, could not then be terminated.

Defendant argues that the government presented no evidence to support the claim made in its opening statement; that the reason for the "stall" was false; that the true reason was because the government's case against Wil-

liams was insufficient; and that there was no good faith basis for the government's opening statement.

If the government failed to present evidence on an essential aspect of the case, this could have been grounds for dismissal of a charge, and it certainly was fair argument to the jury about the strength of the government's case. For defendant to suggest, however, that there was no good faith basis for the goverment's opening statement is frivolous.

The sequence of the events undercuts defendants' argument. At about the same time that defendant Williams accepted stock, in August, 1979, the Abscam investigators began a series of bribe transactions with congressmen that continued up into January of 1980. In order to complete those transactions the agents had to keep "Abscam" undercover. Moreover, the resale of the titanium project was first suggested to defendants in September of 1979, some two months before the November 19th meeting when, defendants argue, the need for a "stall" arose.

Both in this context and others, defendants misplace their reliance upon the internal FBI memorandum of November 27, 1979, which summarized the meeting of November 19. After reviewing the status of the Abscam investigation, certain conclusions and recommendations were reached by the relatively large group that had been assembled for the purpose. Among that group were those from New Jersey who insisted that there was no case at all against Senator Williams.

The recorded conclusion of the meeting was that it was "necessary to re-contact U.S. Senator Williams" for two purposes: to obtain a commitment that he would sponsor legislation relating to the titanium mine and to confirm that Williams wanted his shares hidden. The memo concludes that "if" such information was obtained "prose-

cutors at the meeting" felt that they could prove Williams guilty of bribery and conspiracy. The court does not construe the word "necessary" and the conditional "if" to be binding limtations upon the government's ability to act upon information that was already in its possession, or upon other, additional information they might discover. The meeting must be viewed in the context of a sharp division within the justice department, not only between the Brooklyn and New Jersey prosecutors, but also with respect to the claims by the Philadelphia prosecutor that he should be given an opportunity to develop an Abscam case there.

Clearly, the Brooklyn prosecutors did not feel that the recontact was "necessary", even though they may have viewed it as a desirable means of strengthening their case. Clearly, too, those with veto authority over the prosecutions did not view the conditional "if" in the memorandum to be a binding limitation that would prevent prosecution unless the designated information was obtained, because the information was not obtained and those same people ultimately approved the prosecution anyway.

A more balanced view of the November 19th meeting and its ensuing November 27th summarizing memorandum is that the wording of the memorandum was designed to confirm agreement upon some future action with respect to defendant Williams that would be taken, without imposing limitations either upon the investigation or upon the eventual prosecution.

At bottom, defendants' argument contends that unless everyone on the government's side agrees that the available evidence makes out a case, a subsequent indictment and conviction based on that evidence violates some right of the defendant. Such has never been the law. Prosecutors frequently disagree with each other about the weight and sufficiency of evidence, just as they do with defense attorneys and, on occasion, with judges.

Nor can it seriously be argued, as do defendants and others, that the internal disputes of the justice department were proper evidence for the jury's consideration. Such discussions and their related memoranda constitute protected work product because they reflect counsel's analysis and opinions concerning the case. Some of those disputes have subsequently been disclosed in these and other due process hearings. Such disclosures were permitted in order to plumb the utmost depths of defendants' claims. However, those opinions and the memoranda embodying them were not relevant to any of the specific issues the jury was called upon to decide in this case.

In short, neither the document nor testimony about the meeting was admissible at the trial, because opinions of government counsel about the strength or weakness of their case are irrelevant to the jury's determination of guilt and innocence. The rule could not properly be otherwise. Indeed, if the prosecutor's opinion that he had a weak case was admissible for jury consideration, in fairness so also should be his opinion that he has a strong case. Clearly, such considerations are improper as evidence for jury evaluation. When expressed in summations they are unprofessional and, possibly, grounds for reversal. Worst of all, if admitted into evidence, such opinions would not only make witnesses out of prosecutors,[16] but they would distract the jury from their essential role in the criminal process: determining guilt or innocence based upon the evidence.

D. Feinberg as "*Bag Man*".

Defendants vigorously protest the government's characterization of Feinberg as defendant Williams' "bag man". Defendant Williams' complaint about use of the

---

[16] The Canons of Ethics strongly discourage the trial attorney from being a witness at trial. *See* ABA Code of Professional Responsibility and Code of Judicial Conduct. DR 5-102.

term is focused upon the government's brief on the post-trial due process hearing. Defendant Feinberg complained about use of the term in the government's summation.

Codefendant and co-conspirator Errichetti originally tacked the label on Feinberg in a recorded conversation with Amoroso and Weinberg on March 24, 1979. Gov't ex. 3A. When the characterization first came up at the trial it was in the context of testimony by a government witness that Errichetti had referred to Feinberg as Williams' "bag man". Defendants' objection to the characterization was sustained, and the jury was told to disregard it. The reasons for the ruling were that Errichetti's opinion was of little probative value, his credibility was seriously suspect, and there seemed to be no need to add to what was already in evidence on the tape.

No further mention of "bag man" occurred until as the first question on Feinberg's direct examination, his attorney asked.

> Mr. Feinberg, are you now, or have you ever been Senator Williams' bagman? Tr. 3540.

Feinberg, of course, denied, the characterization. On cross-examination, the government's attorney explored Feinberg's understanding as to what a "bag man" is, and as to the relationship between an influential politician and his bag man. Essentially, Feinberg testified that the term has corrupt connotations, that a bag man is someone who would accept money on behalf of a public official and funnel that money to him, and that a bag man basically is someone who is out front for a public official, who saves the public official from certain contacts and exposure. Tr. 3794-96.

Given Feinberg's own explanation of the term before the jury and the evidence with respect to the relationship between Feinberg and Williams, coupled with their specific statements and conduct in this case, it was fair argument to the jury that Feinberg fit his own definition

of the term and that he was, indeed, Senator Williams' "bagman". *A fortiori* the government's characterization of Feinberg in a post-trial memorandum as the "bag man" for Senator Williams, is not improper.

E. *Summations.*

Defendants attack the government's summations as being improper and unprofessional, and argue that they constitute a basis for a new trial. They rely particularly on the Second Circuit's recent decision in *U.S.* v. *Modica*, 663 F.2d 1173 (1981).

In light of the arguments presented, the court has reviewed the summations by government counsel and finds no impropriety warranting corrective action. *Modica* underscores the ethical principle that an attorney should not vouch for the credibility of his own witnesses. However, the line between vigorous argument over credibility and improper "vouching" is not always easy to draw. Moreover, there are practical differences in the impact of an argument in support of one's own witnesses and an argument that attacks those of the adversary.

Modica did not intend to stultify effective argument. A variety of sanctions against improper argument are suggested there, but defense counsel in this case sought at trial, and still seek only the most drastic—a mistrial. With one exception, not relevant here, there was no objection to the prosecutor's remarks when they were made. Only at the conclusion of summation was an objection raised.

The closing arguments of all counsel in this case were spirited, vigorous, robust, and hard-hitting. They focused the issues clearly for the jury. Central to the case were the credibility of defendant Williams, of defendant Feinberg, and of Sandy Williams, the government's immunized witness. The essence of the government's case was that the true conduct and intent of defendants Wil-

liams and Feinberg could be determined from their statements on the tape recordings. When each of them testified at the trial they attempted to explain what they had said, what they had done, and why they had done it—all in non-criminal terms. The government contended that both were lying at the trial. The prosecutor pulled no punches; he called a lie, a lie. In attacking Sandy Williams, defendant Williams' attorney did the same. "Lie" is an ugly word, but it is appropriate when it fairly describes the ugly conduct it denotes.

In this court's judgment, the combined effect of all counsels' arguments at the end of this long trial was one of sharp conflict over the issues, a painstaking clarification for the jury of the essential points of dispute, and a demonstration of the adversary process functioning at its best. Throughout, the prosecutor's arguments were supported by the evidence, constituted fair comment on the evidence, and were conducted in a professional, ethical, fair and constitutional manner. Defendants' motions for a new trial on this ground are denied.

X. CONCLUSION

The central inquiries running through all of the "due process" issues were whether defendants were treated fairly, whether the trial was conducted in accordance with established principles of fairness and constitutionality, and, ultimately, whether the jury's verdicts of guilty were just. On the entire record it is clear that defendants entered on a course of conduct knowingly and voluntarily, and that before committing the criminal acts charged against them they were aware that corrupt use of Senator Williams' political influence and power was to be an essential part of the titanium deal. While the anticipated profit was substantial, the inducements offered by the government did not make irrelevant the defendants' predisposition to commit the crimes. Their predisposition having been found by the jury on evidence

that is not only sufficient but convincing, the determinations of guilt are proper.

The court has found no merit in defendants' arguments of governmental misconduct sufficient to warrant either dismissal of the indictment or a new trial. This applies not only to the arguments specifically discussed in this decision, but a variety of additional arguments raised in the papers submitted, all of which have been considered and found wanting by this court.

Accordingly, defendant Feinberg's motion for judgment of acquittal on count 5 is granted. All other motions by defendant Feinberg and by defendant Williams are denied. Defendants shall appear for sentencing at the Long Island Courthouse on January 26, 1982 at 1:30 p.m.

SO ORDERED.

APPENDIX C

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of April one thousand nine hundred and eighty-three.

Present:

HON: HENRY J. FRIENDLY
HON: JON O. NEWMAN
HON: AMALYA L. KEARSE

Circuit Judges

82-1111

82-1123

UNITED STATES OF AMERICA,
Appellee,

v.

HARRISON A. WILLIAMS, JR.
and ALEXANDER FEINBERG,
Defendants-Appellants.

[Filed Apr. 5, 1983]

Appeal from the United States District Court
for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

by: /s/ Edward J. Guardaro
EDWARD J. GUARDARO,
Deputy Clerk

APPENDIX D

Order denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-fourth day of May, one thousand nine hundred and eighty-three.

82-1111

82-1123

UNITED STATES OF AMERICA,
Appellee,

v.

HARRISON A. WILLIAMS, JR.,
and ALEXANDER FEINBERG,
Defendants-Appellants.

[Filed May 24, 1983]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Harrison A. Williams, Jr.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge

on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO
Clerk

by: /s/ Francis X. Gindhart
FRANCIS X. GINDHART
Chief Deputy Clerk

APPENDIX E

Charge of the trial court on entrapment

T 5572-80, 5700-07

The fifth element is that the defendant was not the victim of entrapment. Each defendant claims that he was the victim of entrapment as to each of the offenses charged in the indictment, including this bribery offense of count two. Entrapment is a legal term. It has a technical meaning which is different from that of popular speech or ordinary usage; therefore, I must explain the meaning of entrapment as the term is used in its legal sense.

The term entrapment means that law enforcement officials, acting either directly or through an agent such as Melvin Weinberg here, induced or persuaded an otherwise unwilling person to commit an unlawful act. The fact that the government officials or their agents merely afforded opportunity to one who is ready and willing to violate the law when the opportunity presents itself, does not constitute entrapment; however, in their efforts to enforce the laws, government officials and their agents may not entrap an innocent person who, except for the government inducement, would not have engaged in the criminal conduct charged. Entrapment occurs only when the criminal conduct was the product of the creative activity of the law enforcement officials or their agents; that is, if they initiate, entice, induce, persuade or lure an otherwise innocent person to commit a crime and to engage in criminal conduct, the government may not obtain a conviction based upon the fruits of that instigation. In this case, entrapment must be determined separately for each of the defendants.

From the evidence in this case, it is clear that the law enforcement officials set up Abdul Enterprises and, through Anthony Amoroso and Melvin Weinberg and others, conducted what has been called the Abscam Operation. They let it be known through Angelo Errichetti

and others that they had large sums of money to invest, and they told defendant Williams and his co-venturers that a condition of the loan and the later stock purchase was that defendant Williams use his influence as a senator to obtain government contracts for purchasing the titanium. Given these circumstances, there is, of course, some evidence in the case that it was at least in part the activity of law enforcement officials that induced defendant Williams to attend the various meetings and discuss the proposed transactions for purchase of the titanium mine and processing plant.

Under the law of entrapment, therefore, that leaves for you, the jury, to determine as the decisive question on this entrapment issue whether the defendant was predisposed to commit the crime; that is, whether he was ready and willing to commit a crime such as charged here whenever a favorable opportunity was offered.

To sustain its burden of proof the government has to satisfy you that its agents have not induced an innocent person, but that the inducement which brought about the offenses charged simply brought about another instance of the kind of conduct which the defendant was prepared to engage in, if offered an opportunity which appeared favorable. Thus, if the prosecution has satisfied you beyond a reasonable doubt that the defendants were ready and willing to commit the offenses charged whenever a favorable opportunity was offered to commit them, then you may find the government did no more than furnish a convenient opening for the criminal activity in which the defendants were prepared to engage.

You may find that one of the defendants was not the victim of entrapment while deciding that the other was. Each defendant's assertion of entrapment must be considered without regard to your conclusion to the other's entrapment claim.

In determining whether either defendant, if afforded a favorable opportunity, was predisposed to engage in the

kind of criminal activity for which he is charged, you should look to the totality of the circumstances shown by the evidence, including the nature and extent of the inducement offered. In weighing the circumstances to determine this issue of predisposition, you may consider, among other things, the impact that the conduct of the government agents had on the defendant, both directly and indirectly through its effects on the alleged co-conspirator Sandy Williams, George Katz, and Angelo Errichetti. The central question for each defendant on this entrapment issue focuses on his own state of mind to be determined from all the circumstances. Was he predisposed to commit the crime? Predisposition may be shown in one or all of the following ways.

First, you may find that either defendant was predisposed to commit the offenses charged by evidence that satisfies you that the defendant had already formed a design to commit the offense before there was any inducement by an agent of the government.

Second, you may find that a defendant was predisposed to commit the offense charged from the manner in which the defendant reacted or responded to the government's inducement and to the general conduct of the government agents. In other words, did the defendant hesitate? Was he reluctant to take the stock, or receive a loan, or receive the proceeds from the sale of the mining venture? Or, did he readily agree to the agents' proposals?

Third, predisposition may be established by evidence of an existing course of conduct similar to the conduct that forms the basis of the charges in the indictment. Such prior contemporaneous conduct need not be criminal. Rather, for purposes of considering evidence of prior acts on the issue of entrapment, the prior conduct may be weighed, if you find that it was similar to the conduct that forms the basis of the present charges.

In this connection, counsel have reviewed with you various matters in evidence such as the Ritz Casino transactions, the Economic Development Authority's proposed loan to Biocel of Sussex County, the discussions about assisting the sheik in immigrating to and residing in this country; the claimed agreement by defendant Williams to accept the offer of $20,000.00 for expenses, and certain other matters. Keep in mind in this connection there is no evidence connecting defendant Feinberg with either the E.D.A. loan to Biocel or to the alleged $20,000.00 in expense money offered by the sheik.

Also, in this connection, you may recall some evidence to the effect that defendant Williams' office in Camden is in defendant Feinberg's office building. Such a lease is worked out through the Senate's Sergeant of Arms and should not be weighed by you as any evidence of predisposition. That evidence was offered and should be considered by you only as background evidence with respect to the relationship between defendant Williams and defendant Feinberg.

Counsel have argued to you about the inferences to be drawn from the evidence with respect to predisposition. You should consider that evidence and consider those arguments carefully.

Finally, in deciding predisposition, you may also weigh and consider the evidence of each defendant's reputation and character, and any other matter in evidence which tends to show whether or not the defendant was ready and willing to commit any of the crimes charged.

The defense of entrapment is based upon the policy of the law not to ensnare or entrap innocent persons into the commission of a crime. But a line must be drawn between the entrapment of the unwary innocent and the trap for the unwary criminal. Law enforcement officials are not precluded from using artifice, stealth and stratagems such as the use of decoys, and undercover agents,

in order to apprehend persons engaged in criminal activity, provided they merely afford opportunities or facilities for the commission of offenses by those who are ready to commit them. Law enforcement officials may properly make use of undercover operations in which they assume false names and false appearances. They may properly assume the roles of members of fictitious organizations. They may properly offer or give to the defendants the money, stock, loans or other things of value that are involved in the commission of the offense itself, and they may properly instigate the offer of money, stock, loans or other things of value to a defendant.

Whether you approve or disapprove of these or other practices engaged in during the Abscam investigation should not enter into your deliberations. Your function is to decide whether you are satisfied beyond a reasonable doubt that each defendant was predisposed; that he was ready and willing to commit the offense charged.

You have heard the evidence and arguments of counsel. You must determine for each of the crimes whether the government has established this element, that the defendant was not a victim of entrapment, and you will decide that by determining whether the government has established that the defendant was predisposed to commit the crime.

* * * *

Office-Supreme Court, U.S.
FILED
NOV 7 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 83-256 and 83-5108

In the Supreme Court of the United States

OCTOBER TERM, 1983

HARRISON A. WILLIAMS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ALEXANDER FEINBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

CAROLYN L. GAINES
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether it was plain error justifying reversal to instruct the jury, in connection with petitioners' entrapment defense, to determine petitioners' predisposition at the time they committed the offense.

2. Whether petitioners' convictions on bribery-related offenses should be reversed because government undercover agents offered large sums in exchange for the improper use of a United States Senator's influence.

3. Whether evidence of prior similar acts was incorrectly admitted against petitioner Feinberg.

4. Whether warrantless electronic recordings of a meeting, made with the consent of at least one party to the meeting, violate the Fourth Amendment.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 8

Conclusion 22

TABLE OF AUTHORITIES

Cases:

Criden v. *United States*, cert. denied, No. 82-1240 (May 31, 1983) 21

Cupp v. *Naughten*, 414 U.S. 141 12

Henderson v. *Kibbe*, 431 U.S. 145 12

Lederer v. *United States*, cert. denied, No. 82-1183 (May 31, 1983) 21

Murphy v. *United States*, cert. denied, No. 82-1187 (May 31, 1983) 21

Myers v. *United States*, cert. denied, No. 82-1255 (May 31, 1983) 4, 21

Thompson v. *United States*, cert. denied, No. 82-1199 (May 31, 1983) 21

United States v. *Caceres*, 440 U.S. 741 16

United States v. *Parisi*, 674 F.2d 126 12

United States v. *Russell*, 411 U.S. 423 16

United States v. *White*, 401 U.S. 745 21

Page

Constitution, statutes and rules:

U.S. Const. :

Amend. IV 21

Amend. V (Due Process Clause) 16, 17

18 U.S.C. 201(c) 2

18 U.S.C. 201(g) 2

18 U.S.C. 203(a) 2

18 U.S.C. 371 2

18 U.S.C. 1952 2

Fed. R. Crim. P. :

Rule 12(b)(3) 21

Rule 12(e) 21

Fed. R. Evid. 404(b) 20

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-256

HARRISON A. WILLIAMS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 83-5108

ALEXANDER FEINBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a)[1] is reported at 705 F.2d 603. The opinion of the district court (Pet. App. 46a-87a) is reported at 529 F. Supp. 1085.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1983 (Pet. App. 88a-89a). A petition for rehearing was denied on May 24, 1983 (Pet. App. 90a-91a). The

---

[1] "Pet. App." refers to the appendix to the petition in No. 83-256.

petition for a writ of certiorari in No. 83-5108 was filed on July 22, 1983. In No. 83-256, Justice Marshall extended the time for filing a petition for a writ of certiorari to August 22, 1983, and the petition was filed on August 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, each petitioner was convicted on two counts of bribery, in violation of 18 U.S.C. 201(c); two counts of receipt of an unlawful gratuity, in violation of 18 U.S.C. 201(g); two counts of unlawful conflict of interest, in violation of 18 U.S.C. 203(a); and two counts of interstate travel to carry on the unlawful activity of bribery, in violation of 18 U.S.C. 1952.[2] Each petitioner was also convicted on one count of conspiracy to commit these substantive offenses and to defraud the United States, in violation of 18 U.S.C. 371. Petitioner Williams was sentenced to concurrent terms of three years' imprisonment and fines totalling $50,000. Petitioner Feinberg was sentenced to concurrent terms of three years' imprisonment and fines totalling $40,000. Pet. App. 4a-5a.

1. In 1975, Henry A. (Sandy) Williams, III, a friend and business associate (but not a relative) of petitioner Williams, who was then a United States Senator from New Jersey, acquired an option on mining property in Piney River, Virginia.[3] Sandy Williams believed that property to be rich in titanium, and he discussed the mine's potential

---

[2]The district court granted petitioner Feinberg's motion for judgment of acquittal on one of the counts charging interstate travel to conduct the unlawful activity of bribery (Pet. App. 58a-59a), and that count is not now in issue.

[3]Sandy Williams testified for the government at the trial under a grant of immunity (Pet. App. 5a).

with Senator Williams, saying that he would need help in making the venture operative. Senator Williams told Sandy Williams "that he would 'give [the mining project] all the help that he could' " (Pet. App. 6a). In return Senator Williams was to receive one half of Sandy Williams's interest in the corporation that owned the mine. *Id.* at 5a-6a.

In 1976, Sandy Williams exercised the option on the Piney River property. He had a 28 1/3% interest (including that committed to Senator Williams) in the corporation that took title to the property. On March 23, 1976, Sandy Williams executed a document acknowledging Senator Williams's half interest in his share of the corporation; Senator Williams retained that document in his office. Petitioner Feinberg, a "long-time friend and associate" of Senator Williams, also acquired an interest in the mining venture, "in return for his looking after the Senator's interests and helping to make presentations to potential investors" (Pet. App. 7a). The venture remained dormant, however, because it lacked the necessary capital (*id.* at 6a).

In January 1979, Angelo Errichetti, then Mayor of Camden, New Jersey, mentioned to Senator Williams that he had established contact with wealthy Arab sheiks seeking to invest a large amount of money. The people whom Errichetti contacted were in fact FBI undercover operatives engaged in what has come to be known as the Abscam investigation. Senator Williams told petitioner Feinberg to contact Errichetti about the investors and " 'see what the hell's going on.' " Pet. App. 6a-7a.

Soon thereafter, Feinberg, Errichetti, and Sandy Williams arranged a meeting with two persons — FBI informant Weinberg and an FBI agent — who were posing as representatives of the wealthy sheik. Errichetti told the sheik's representatives that Feinberg was Senator Williams's "bagman." Feinberg made it clear that Senator Williams

had an undisclosed interest in the mine and said that Senator Williams was eager to see the venture funded. Pet. App. 7a, 51a. Sandy Williams initially suggested to the undercover agents that $13 million would be needed to fund the venture; in early March, he revised that estimate to $100 million, explaining that the mining corporation should purchase a nearby processing plant. *Id.* at 7a.

Senator Williams met with the sheik and his representatives on seven different occasions (Pet. App. 52a). His first meeting with them was on a yacht in Florida on March 23. Two days before that meeting, Sandy Williams told Senator Williams that the meeting was "important," and Senator Williams replied: "Sandy, look, I will do everything possible to get that money." At the meeting, Senator Williams said to one of the sheik's representatives that he would "assist * * * in any way possible in getting this project going." The next day, Errichetti told the sheik's representatives that the Senator "can be of service to you in Washington or wherever. This is Government stuff, now." *Id.* at 7a-8a.

In May 1979, George Katz, another friend of the Senator who was also a participant in the mining venture, read a newspaper article describing the government's need for titanium for defense purposes. Katz then suggested — in a telephone call to informant Weinberg, who was acting as the sheik's representative, and in a conversation with Sandy Williams — that the Senator could help the venture by obtaining government contracts.[4] On May 30, Weinberg,

---

[4]In its opinion rejecting petitioners' challenges to the verdicts, the district court described Katz as "a businessman with a known criminal background" (Pet. App. 63a).

Katz and Errichetti were indicted with petitioners. Katz was severed because he was too ill to stand trial. Errichetti was severed because he was tried (and subsequently convicted) on charges arising out of another aspect of the Abscam investigation. See *Myers* v. *United States*, cert. denied, No. 82-1255 (May 31, 1983).

pursuing Katz's suggestion, asked Feinberg in a tape-recorded conversation whether Senator Williams could "do something on getting us the contracts." Feinberg replied: "We can try." The next day, Senator Williams again met with the undercover agents. Immediately before the meeting, Feinberg told Weinberg, in a conversation that was again recorded: "On the contracts, I can tell you now that he will open up the doors for us. And use his, you know what I'm talking about, to get the contracts." Pet. App. 8a-9a.

Also immediately before meeting the agents, Senator Williams met with Feinberg and Sandy Williams. Sandy Williams testified that at this meeting, Feinberg told Senator Williams, calling him by his nickname, "Pete, the important thing [a]bout this meeting is going to be your help in getting government contracts." The Senator replied: "I understand." Pet. App. 9a-10a.

After the subject of government contracts arose at the meeting with the agents, Senator Williams remarked, "I can't say yes or no, sure try." The court of appeals described the context in which this remark occurred (Pet. App. 10a; footnote omitted):

> The audio tape of this meeting is inaudible as to the conversation preceding the Senator's remark, but other evidence abundantly permitted the jury to conclude that the Senator was referring to his role in obtaining government contracts. First, the conversations just prior to the [meeting] indicate that the Senator understood his role. Second, [undercover agent] Amoroso [acting as a representative of the sheik] * * * testified that the Senator's willingness to "try" was expressed in response to a statement that the Senator's aid in obtaining government contracts was one of the reasons for the loan. Third, after the meeting, both

Feinberg and Sandy Williams reminded the sheik's representatives that the Senator had said he would try to get government contracts.

On June 28, the Senator again met with the sheik and his representatives and, in an effort to persuade them to make the loan, boasted of his influence in the government. In the course of this videotaped conversation, Senator Williams spoke of his close relationship with the Vice-President and the Secretary of State and said that he would be pleased to speak personally with the President on behalf of the mining venture. Pet. App. 11a.

At this meeting, Senator Williams mentioned the output of the mine and commented, "knowing the need of our country, being here in a position to go to ah well, you know, right to the top on this one." Agent Amoroso, posing as the sheik's representative, said to Senator Williams that the sheik "feels that with you behind this thing, with the people that you know, the ah government contracts, available, you know, this whole thing —." Senator Williams's reply was: "Right through." Agent Amoroso then commented that he wanted the Senator to meet the sheik because otherwise the sheik "would've felt it was just another business deal." Errichetti then said: "Well, without the Senator, there is no — forget it. There's no, no mines or nothing." Senator Williams said: "Yes, I, I've been here decades and, uh, in that position you come up to those positions and you work with the people that make the decisions." The following exchange then occurred:

Amoroso: Well, then, there — in that respect, then, with you being in that position and contracts and, uh, the like would not be a problem.

Williams: No problem. No. In a situation where we can just sit around and describe, they'll see, it will come to pass.

Pet. App. 11a-13a.

During the same videotaped conversation, Senator Williams explained that he was being helpful because "I'm not gonna be in this situation forever and I want to have a you know foundations which give me that independence when I, later time." Senator Williams and Amoroso then agreed that stock certificates intended for Senator Williams would be issued initially to Feinberg, who could transfer them to the Senator at some later time. At a subsequent recorded meeting, on August 5, Senator Williams accepted stock certificates representing an 18% share in the corporations Feinberg had formed to carry out the mining venture. In keeping with their agreement, the certificates were made out to Feinberg, who endorsed them in blank. The court of appeals quoted the following excerpt from the recorded conversation, in which, it noted, Senator Williams "acknowledged his understanding of the arrangement":

Amoroso: [T]hese are the certificates and I had Alex endorse them. . . .

. . . . . .

Williams: And he just endorsed these over then.

Amoroso: Yeah.

Williams: In blank.

Weinberg: Right.

Williams: Very good.

Weinberg: So they're blank you can leave them blank and when you want to put your name in it you can put your name in it.

Pet. App. 13a-14a.

2. At the same meeting, the sheik's representatives suggested that another group of Arab investors might be willing to buy the mining venture outright. According to

Sandy Williams's testimony, Senator Williams twice told his associates that, as part of the purchase transaction, he would agree to seek government contracts on behalf of the new owners. At a subsequent videotaped meeting at which the proposed sale was discussed, Weinberg said to Senator Williams: "The whole thing on this sale depends [on] you and the government getting the contracts for us cause the whole thing depends upon it. * * * If you have any qualms about it, you wanna keep it the same, it makes no difference to me either way. But the whole thing depends upon you to work the same capacity as you working for us to get us government contracts." Senator Williams agreed, saying: "We got this all together on certain premises and they will, they will continue." Pet. App. 15a-16a. At a videotaped meeting on October 7, Senator Williams, Feinberg, and Amoroso discussed ways in which Senator Williams's profits from the sale of the venture could be concealed until he retired; they agreed to use some form of blind trust, and Senator Williams remarked that such an arrangement would ensure that "nobody knows nothing" (*id.* at 16a-17a).

ARGUMENT

1. a. Petitioner Williams's principal contention (83-256 Pet. 12-19), joined by petitioner Feinberg (83-5108 Pet. 36-37), is that the convictions should be reversed because of a supplemental instruction that dealt with petitioners' entrapment defense. During its deliberations, the jury sent a note to the district judge asking the following question (Pet. App. 30a):

> Does entrapment have to be established from day one of the indictment or can it be established further along in the operation?

Petitioner Williams's counsel noted that the question appeared to presuppose that the defendants had the burden of proof; he contended that since it was undisputed that the

government had induced petitioners to commit the offense, the government had the burden of proving predisposition beyond a reasonable doubt. Petitioner Williams's counsel further urged that the government had to prove "from on or about the first day of January, 1979, these two men were predisposed beyond a reasonable doubt." Petitioner Feinberg's counsel, taking issue with petitioner Williams's attorney, argued that "when he says that you have to have entrapment from square one, the answer is no, no, no, no." Pet. App. 30a.

When the jury was recalled, the district judge explained that since inducement had been shown, the burden of proving predisposition was on the government, not the defendants. He then made the statement to which petitioners object:

> You said from day one, or at some other time. You have to decide when the crime was committed, if you get to that element, and then determine as of that time when he committed the crime was he predisposed to do it or wasn't he.

Pursuant to an agreement reached with counsel before the jury was recalled, the trial judge then repeated the charge on entrapment he had previously given. After the jury again retired, the district judge asked if counsel had any objections; except for reiterating their objections to the initial charge, they made none. Pet. App. 31a.

The court of appeals ruled that "[a]s a general proposition of law" the challenged supplemental instruction "was erroneous" because "[n]ormally, predisposition refers to the state of mind of a defendant before government agents make any suggestion that he should commit a crime" (Pet. App. 31a-32a). But the court of appeals nonetheless declined to reverse the convictions "[i]n the circumstances of this

case" (*ibid.*). The court explained (*id.* at 32a-33a; footnotes omitted):

> First, neither counsel, after hearing the statement, objected to it or asked for a clarifying instruction. Second, neither counsel had suggested to [the district judge] a correct statement of the law that would have answered the jury's questions. [Petitioner Williams's counsel's] initial suggestion that predisposition had to be proved from "day one . . . on or about the first day of January, 1979" was, as [the district judge] noted, an overstatement. The earliest that predisposition had to be established was as of the time when the agents first presented the criminal opportunity to the defendants, which was May 30 with Feinberg and May 31 with the Senator. There was no reason to focus the jury's attention on the Senator's state of mind at the start of the indictment period, which was five months before any criminal opportunity was broached by the undercover agents. Third, the isolated remark complained of was followed by a rereading of the full charge on entrapment, which correctly set forth the applicable principles * * *.

Finally, and "most important," the court explained, "the statement as to time of predisposition was not prejudicial because the criminal opportunity was accepted when it was first presented. The time when the crime was first committed virtually coincided with the pertinent time for assessing predisposition. Thereafter the Senator simply repeated and emphasized his willingness to commit the crimes." *Id.* at 32a-34a.

b. Petitioners' principal contention is that the government must prove that they were predisposed to commit a crime when "the Government agent first approached the[m]" (83-256 Pet. 16) — before any illegality was

broached. This is wrong. As the court of appeals explained (Pet. App. 32a n.9):

> In many cases, including this one, undercover government agents discuss non-criminal matters with a target before presenting a criminal opportunity. * * * Since the entrapment defense exonerates a defendant who has been induced to commit a crime he would not otherwise have committed, the inducement must consist of efforts to persuade him to commit the crime, and those efforts will normally not occur until the criminal proposition has been broached. Simply cultivating the friendship of a target preparatory to presenting a criminal opportunity is not inducement to commit a crime.

As the court of appeals recognized,[5] it may be possible to imagine cases in which the jury, in deciding whether a defendant was predisposed, should consider whether government agents created in the defendant a willingness to commit a crime before they actually made an explicit suggestion of criminality. But this is plainly not such a case. Between January 1979, when Senator Williams's associates first contacted the Abscam investigators, and May 1979, the first occasion on which a government agent suggested illegal activity in connection with the mining venture, Abscam operatives did nothing that might have made a law-abiding person willing to engage in criminal acts. The agents simply gave petitioners and their associates an opportunity to act in the way they would have acted toward anyone who expressed an interest in investing money in their venture. Government agents did not concoct the mining venture; they did not induce Senator Williams to accept a financial interest in the venture, for he had done so before the

---

[5]See Pet. App. 32a n.9 ("We do not rule out the possibility * * * that cases may arise in which the agents in their preliminary contacts with a target indirectly suggest that a crime might occur, even though they do not explicitly invite the target to commit one.").

Abscam investigation even began. Nor did they persuade Senator Williams to take an active role in promoting the venture: Senator Williams's immediate reaction upon hearing of the wealthy Arabs was to ask petitioner Feinberg to pursue the matter further; the Senator's associates freely bandied his name about, apparently with his assent; and the Senator met with the undercover agents in March to demonstrate his active support for the venture. If, in January 1979, petitioners and their associates were disposed to obtain financing only through lawful means, nothing the undercover agents did prior to the time criminal conduct was suggested would have changed that disposition.

In addition, as the court of appeals noted, trial counsel did not object to the district judge's supplemental instruction, even though the judge specifically gave them an opportunity to do so. If the precise timing of the inquiry into predisposition were as central to the defense as petitioners now suggest, it is difficult to understand why there was no objection. See also *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977) (footnote omitted) ("It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.").

Finally, as the court of appeals again noted, the district court reread the full entrapment instruction immediately after it gave the supplemental instruction. Taken as a whole (see, *e.g.*, *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973); *United States* v. *Parisi*, 674 F.2d 126, 127-128 (1st Cir. 1982)), the instructions made it clear to the jury that it should acquit the defendants if it believed that government agents instilled in them a disposition to commit the crimes:

> The term entrapment means that law enforcement officials, acting either directly or through an agent such as Melvin Weinberg here, induced or persuaded an otherwise unwilling person to commit an unlawful act.

> * * * [I]n their efforts to enforce the laws, government officials and their agents may not entrap an innocent person who, except for the government inducement, would not have engaged in the criminal conduct charged. * * * [If government agents] initiate, entice, induce, persuade or lure an otherwise innocent person to commit a crime and to engage in criminal conduct, the government may not obtain a conviction based upon the fruits of that instigation. * * *
>
> * * * * *
>
> In determining whether either defendant, if afforded a favorable opportunity, was predisposed to engage in the kind of criminal activity for which he is charged, you should look to the totality of the circumstances shown by the evidence, including the nature and extent of the inducement offered. In weighing the circumstances to determine this issue of predisposition, you may consider, among other things, the impact that the conduct of the government agents had on the defendant, both directly and indirectly through its effects on the alleged co-conspirator[s] Sandy Williams, George Katz, and Angelo Errichetti. * * *

Pet. App. 92a-94a. See also Pet. App. 33a n.10.

2. Both petitioners also contend that the government's conduct was so outrageous that their convictions should be reversed on due process grounds (83-256 Pet. 20-27; 83-5108 Pet. 23-29). These contentions are without merit. The record shows that the agents acted properly at each stage of the investigation.

The agents did not approach petitioners to discuss the mining venture; Feinberg and Sandy Williams approached the agents through Errichetti. At the first meeting in January 1979, Feinberg made it clear that Senator Williams had

an interest in the venture, and Errichetti described petitioner Feinberg as the Senator's "bagman." Senator Williams then agreed to meet with the agents. After that meeting, Errichetti told them that the Senator could "be of service to you in Washington." Pet. App. 6a-8a.

The agents were surely under no obligation to ignore these broad hints of corruption. As the district judge, who presided over the trial, explained in rejecting petitioners' motions to set aside the verdicts (Pet. App. 62a-63a):

> As early as March, 1979 there had been presented to the Abscam investigators, at defendant Williams' initiative, a proposed business venture whose principals included a businessman with a known criminal background (Katz), a grossly corrupt local politician (Errichetti), a lawyer (Feinberg) who was advertised by one of his own co-venturers as a "bag man" and who showed he was willing, if not anxious, to pay and receive bribes * * *. All three of them were enthusiastically pushing a titanium mine in which a United States Senator (Williams) had a hidden interest.

In this context, petitioners' associate Katz proposed that Senator Williams's influence could be used to obtain government contracts. When an agent repeated that proposal to petitioners, petitioners considered it briefly and then readily accepted. In short, the agents merely undertook the investigative actions needed to expose the corruption that they had good reason to believe was present.[6]

---

[6]Petitioner Williams emphasizes his refusal, at one meeting with the sheik, to accept a cash bribe in return for assisting the sheik in obtaining permanent resident status in the United States (83-256 Pet. 9-10). But petitioner Williams does not mention that, after having been offered that bribe, he did not terminate the conversation; he continued to discuss the titanium mine with the sheik and, in connection with the mining venture, said that he would help the sheik with his immigration problems (see Pet. App. 23a-24a).

a. Petitioners assert that the large amount of money offered by the undercover agents created an unreasonably great temptation (see 83-256 Pet. 25; 83-5108 Pet. 25-29). But petitioners first agreed to use Senator Williams's influence in exchange for a loan, not a payment of cash. The amount of the loan that the group hoped to obtain was specified, not by government agents, but by petitioners' associate Sandy Williams. Moreover, as the court of appeals and the district court pointed out, the loan was to be repaid with interest; thus its value to petitioners "was not the amount of the loan, but rather the profits they anticipated making as a result of securing financing for their venture. Whatever profits were anticipated were the result of the defendants' estimates; the agents did not offer to assure any particular level of profits in connection with the proposed loan." Pet. App. 36a-37a; see *id.* at 75a.

It appears that the sale transaction, unlike the loan, would have guaranteed a substantial profit for petitioners. But by the time the sale was proposed, petitioners had already entered into one corrupt bargain in return for the loan. Thus they cannot plausibly suggest that the size of the inducement involved in the sale was decisive in overcoming their reservations about acting illegally. In addition, as the court below noted, the sale price was again based on "figures already proposed by the principals in the mining venture" (Pet. App. 37a). Indeed, during the negotiations Senator Williams urged that the sale price be increased. "When a Senator elects to interest himself in transactions involving large sums of money, he cannot claim that it is unconstitutional for undercover agents to frame their offers of criminal opportunities within the financial context he has already established." *Ibid.*[7]

---

[7]See also Pet. App. 37a: "There is no evidence that the Senator's anticipated share of the profits from the loan or the sale exerted an unconscionable pressure upon him."

Moreover, the dollar amount of an inducement cannot be the sole factor in evaluating the propriety of the government's investigative activity. Petitioners were selling something — the influence of an important United States Senator — that can be of enormous value to a person who has a financial stake in the outcome of a government decision. The government and the public accordingly have a strong interest in determining whether a Senator can be corrupted even by very large amounts of money. See Pet. App. 37a ("We doubt that the size of an inducement can ever be considered unconstitutional when offered to a person with the experience and sophistication of a United States Senator.").

At the same time, it is difficult to see how petitioners can claim that they were treated unfairly. They were not in desperate financial condition. They were, it appears, sophisticated businessmen; if, at the time of the proposed transactions, they considered the amounts being offered to be excessive, they must have thought that they were taking advantage of ignorant or gullible investors. On the other hand, if at the time of the proposed transactions they considered the amounts to be reasonable in view of what they were offering, it is difficult to see how the inducement can be viewed as excessive.[8]

---

[8]Petitioner Williams urges (83-256 Pet. 23-25) that the government violated its own guidelines in carrying out the investigation. Contrary to petitioner Williams's suggestion, of course, such guidelines would not define the limits that the Due Process Clause places on law enforcement activity; it is not only appropriate but salutary for the executive branch to go beyond constitutional requirements in regulating its criminal investigations (see *United States* v. *Russell*, 411 U.S. 423, 435 (1973)), and when it does so the restrictions it imposes are not ordinarily enforceable in court (see *United States* v. *Caceres*, 440 U.S. 741 (1979)).

It is also unclear which "guidelines" petitioner is invoking. We are advised by the United States Attorney's office that DP Exh. 110, which petitioner quotes, consists of testimony given by government officials,

b. Petitioner Williams also suggests (83-256 Pet. 25, 26) that the government's conduct of the investigation violated the Due Process Clause because he was "coached" by Weinberg to say that he would aid the investors in obtaining government contracts. But as both courts below noted, when petitioner Williams testified at trial he specifically and repeatedly denied that the "coaching" influenced his behavior. See Pet. App. 27a-28a, 66a-69a. The district judge, who presided over the trial, found that "despite the prompting and 'coaching' by Errichetti and Weinberg before his meeting with the sheik on June 28, 1979, defendant Williams acted voluntarily and intentionally in that meeting and was not influenced to say or do anything that he had not previously agreed to say and do; consequently, Williams was not prejudiced by the conduct of Weinberg and Errichetti" (*id.* at 70a). "At trial Williams' own attorney exhaustively questioned him about the effect of Weinberg's suggestions and comments" (*id.* at 66a-67a), and when asked about Weinberg's "coaching," petitioner Williams testified (*id.* at 27a n.7):

---

after the Abscam operation became publicly known, to a House committee investigating the operation. In that testimony, the officials explained that the operation did conform to the proper standards for regulating such investigative activity.

In any event, the investigation in this case did not violate the "guidelines" that petitioner attributes to the government. The Abscam agents had reason to suspect that criminal activity was afoot from the time of their first meeting with Feinberg, Errichetti, and Sandy Williams, because it was at that meeting that they learned of Senator Williams's hidden interest in the mine and heard Errichetti — the mayor of a large city and an associate of the Senator — describe Feinberg as the Senator's "bagman." The agents made it clear to Senator Williams and his associates that they were interested in exchanging Senator Williams's help in securing contracts for valuable consideration. And for the reasons we have explained, the inducements did not exceed what the "real world" might offer to a United States Senator and those seeking to profit from peddling his influence.

> I think I said yesterday, this is not for me, what he's talking about, that kind of effort to impress the Sheik. I was going to do it my way. So, I didn't really concentrate on that which was meaningless to me.

Similarly, when petitioner Williams was asked whether he was offended by what Errichetti and Weinberg told him to say, he replied (Pet. App. 28a n.7): "It was offensive but it didn[t] mean a great deal to me to tell you the truth." At another point petitioner Williams testified (*id.* at 67a; emphasis added by the district court):

> Q. Senator, now Weinberg is saying to you clearly, government contracts, using your influence. And all you are saying here is um-hum, gotcha, um-hum, um-hum. What were you thinking when this was going on?
>
> A. What I started to develop a moment ago, while he's going on this way I was thinking of what I was going to develop when I got upstairs. * * * *but there can be no exaggeration, no statement of things I know I could not do, would not do* in no shape was I going to be associated with, even in a baloney sense as they called for, and that was a contract.

Petitioner Williams also testified (Pet. App. 27a-28a n.7):

> Q. And didn't Errichetti tell you on June 19th that the only thing the sheik was interested in is your telling him that you would get government contracts?
>
> A. If he said that, it didn't register with me because my mind was not accepting government contracts as any part of this thing.

As the district court explained (Pet. App. 69a):

> At trial, Williams' position was essentially that the videotape did not incriminate him, but the jury obviously rejected his argument. Now, Williams asserts

> that the incriminating statements he made on videotape were the product of coaching; but his sworn testimony unequivocally establishes that his statements and action on camera were voluntary and intentional. They cannot be dismissed as merely the product of Weinberg's urgings.

Since petitioner Williams explicitly and repeatedly asserted that Weinberg's coaching did not influence him, he is plainly not entitled to relief on this basis.

3. Petitioner Feinberg also objects to the district court's admission of evidence concerning other occasions on which petitioner Williams, assisted by petitioner Feinberg, used his influence on behalf of projects in which Williams had a financial interest. On one occasion, petitioner Williams boasted at a meeting with Abscam agents that he had telephoned the chairman of the New Jersey Casino Control Commission in support of an application for a casino license by the Ritz-Carlton Casino. Petitioner Feinberg boasted at the same meeting that he had also used his influence in this way. The Ritz-Carlton employed petitioner Williams's wife as a consultant and later paid petitioner Feinberg a $50,000 fee. Pet. App. 43a.

These efforts to use influence were made without any urging by government agents,[9] and the district court found that petitioners' recorded statements about the ways in which they used their influence were "made under circumstances that were designed to impress the listeners with their know-how, their awareness of political reality, their ability to achieve results, and their willingness to use the Senator's influence for financial gain" (Pet. App. 78a-79a). The other prior acts evidence concerned contacts petitioners Williams

---

[9]Petitioners subsequently claimed that they had not actually attempted to use their influence in these ways, even though they had boasted of doing so in front of government agents (see Pet. App. 77a-78a).

and Feinberg made on behalf of Biocel, a corporation formed by Sandy Williams in which petitioners Williams and Feinberg both had an interest. *Id.* at 42a-43a, 78a-79a.

Petitioner Feinberg acknowledges that evidence of prior acts can be used to show predisposition (83-5108 Pet. 32). His contention appears to be that his prior acts were innocent, not criminal (*id.* at 31-32, 34-35). But Fed. R. Evid. 404(b) permits the introduction of evidence of "other crimes, wrongs, *or acts*" (emphasis added) to prove such things as predisposition. As the court of appeals explained (Pet. App. 43a-44a):

> Conduct " 'morally indistinguishable' " from the offenses charged is probative on the issue of predisposition, *United States* v. *Viviano, supra,* 437 F.2d at 299 n.3 (quoting *United States* v. *Becker,* 62 F.2d 1007, 1009 (2d Cir. 1933)), and admissible subject to the usual weighing of probative force against unfair prejudice * * *. Even if, as [petitioners] contend, the Senator's conduct in the Ritz-Carlton and Biocel matters did not violate New Jersey law, it was probative of his willingness to agree to take similar action to obtain titanium contracts from the federal government, conduct that violates federal law.

In addition to proving predisposition, this evidence was admissible in this case — as the district court noted — to prove petitioners' "motive, opportunity, intent, preparation, and method of operation" (*id.* at 78a).

Moreover, petitioner Feinberg fails to explain how this evidence could have *unfairly* prejudiced him. He was free to argue to the jury that his prior actions were legitimate and did not show a propensity for attempting to profit from the improper use of Senator Williams's influence. If the prior acts evidence was damaging to him, that was only because it did indeed tend to show such a propensity. The district

court's decision to admit that evidence was, as the court of appeals ruled, "well within [its] discretion" (Pet. App. 44a) and does not warrant this Court's review.

4. Petitioner Williams also urges that the videotaping of his meetings with undercover operatives violated the Fourth Amendment (83-256 Pet. 17-30). As petitioner Williams concedes (*id.* at 30 n. 16), this claim for suppression of the videotapes was not raised before trial (see Pet. App. 57a-58a), as required by Fed. R. Crim. P. 12(b)(3). Therefore it may not now be entertained. Fed. R. Crim. P. 12(e).

In any event, it is without merit. This Court has recently declined to review a similar contention made by other Abscam defendants (see 82-1183 Br. in Opp. 12-13).[10] Moreover, as petitioner Williams appears to acknowledge, this contention is inconsistent with *United States* v. *White*, 401 U.S. 745 (1971). Indeed, by recording meetings and conversations, the government helped ensure that the most accurate possible version of the events would be brought before the jury. As the district court remarked, "the quality of evidence produced by tape recordings, particularly by the videotapes in the Abscam cases, far exceeds the sketchy, imperfect evidence availab[l]e in the usual trial based upon witnesses' unaided recollections." In fact, a defendant who has a legitimate claim that he was subjected to improper pressure by government agents is likely to be most benefitted by videotaping in a case like this, because the videotapes will bring before the jury the most accurate possible reproduction of the events at issue.

---

[10] "82-1183 Br. in Opp." refers to the government's consolidated brief in opposition in *Lederer* v. *United States*, No. 82-1183; *Murphy* v. *United States*, No. 82-1187; *Thompson* v. *United States*, No. 82-1199; *Criden* v. *United States*, No. 82-1240; and *Myers* v. *United States*, No. 82-1255. The Court denied certiorari in these cases on May 31, 1983.

Contrary to petitioner Williams (83-256 Pet. 28-30), the videotaping that the government undertook in this case does not even implicate the concerns raised by Justice Harlan's dissenting opinion in *White*. The government did not record private meetings between petitioners and their families or their close personal or political associates; the government videotaped only meetings that petitioners knew were business discussions, and petitioners came to those meetings fully aware that Senator Williams's influence would be a subject of discussion. No harm to society will result if officials become wary that their conduct at meetings of this kind might later be revealed to their constituents and the public at large.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX. E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

CAROLYN L. GAINES
Attorney

NOVEMBER 1983

DOJ-1983-11

Office - Supreme Court, U.S.
FILED
NOV 21 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-256

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARRISON A. WILLIAMS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR PETITIONER

ERWIN N. GRISWOLD
Counsel of Record
CLAIRE L. SHAPIRO
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 861-3898

GEORGE J. KOELZER
JOEL N. KREIZMAN
EVANS, KOELZER, OSBORNE, KREIZMAN & BASSLER
P.O. Box BB
Red Bank, New Jersey 07701
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. IT IS NOT DISPUTED THAT THE SUPPLEMENTAL INSTRUCTION ON THE TIME FOR DETERMINING PREDISPOSITION WAS WRONG AS A GENERAL PROPOSITION OF LAW	2
A. The Government's Interpretation of the Law of Entrapment Leads to Inconsistent Availability of the Defense	2
B. The Erroneous Supplemental Instruction Had a "Substantial Influence" on the Jury Verdict	4
II. THE ACTIONS OF THE GOVERNMENT AGENTS WERE SO OUTRAGEOUS THAT THEY AMOUNT TO A DENIAL OF DUE PROCESS OF LAW	6
III. THE FOURTH AMENDMENT PROHIBITS WARRANTLESS ELECTRONIC SURVEILLANCE WHERE THERE IS NO SUSPICION OF PRIOR OR ONGOING CRIMINAL CONDUCT	9
IV. THE PROCEEDING UNDER SECTION 2255 NOW PENDING IN THE EASTERN DISTRICT OF NEW YORK	10
A. Tampering with the January 15, 1980 Tape	10
B. Exculpatory Evidence Was Improperly Withheld	11
C. "Bag Man"	12
D. Selective Prosecution	12
CONCLUSION	14

TABLE OF CONTENTS—Continued

APPENDICES	Page
A. Affidavit of Perry Quaranta	1a
B. Affidavit of Stephen K. Spyker	3a
C. Affidavit of Edward Ellis	7a
D. Affidavit of Joseph Meltzer	10a

TABLE OF AUTHORITIES

Cases:

Hampton v. *United States*, 425 U.S. 484	7
Katz v. *United States*, 389 U.S. 347	9, 10
Kotteakos v. *United States*, 328 U.S. 750	4
Sherman v. *United States*, 356 U.S. 369	3
Sorrells v. *United States*, 287 U.S. 435	3
Terry v. *Ohio*, 392 U.S. 1	9, 10
United States v. *Russell*, 411 U.S. 423	7-8
United States v. *White*, 401 U.S. 745	9

Miscellaneous:

M. Boudin, "Book Review," 35 Stanford L. Rev. 621	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-256

HARRISON A. WILLIAMS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR PETITIONER

INTRODUCTION

With total disregard for petitioner Williams' conduct if left to his own devices, the Government invented, through the use of a clearly corrupt *agent provocateur*, and relentlessly moved forward a criminal scheme, using vast lures and pressures to induce petitioner to adopt it as his own. This clearly presents fundamental problems relating to the "moral and psychological tension of a criminal justice system in which deception is a central element." M. Boudin, Book Review, 35 Stanford L. Rev. 621, 624 (1983). Government conduct of the duration and scope involved here was not present in the other

Abscam cases. Consequently, this case raises a number of important legal issues relating to the administration of justice in this country, never before decided by this Court. The case is thus an appropriate one in which this Court may provide clarification and delimitation of appropriate Government conduct. Without review here, the Government will have in effect a blank check. This is too broad an allocation of power to the prosecuting authorities.

I. IT IS NOT DISPUTED THAT THE SUPPLEMENTAL INSTRUCTION ON THE TIME FOR DETERMINING PREDISPOSITION WAS WRONG AS A GENERAL PROPOSITION OF LAW.

A. The Government's Interpretation of the Law of Entrapment Leads to Inconsistent Availability of the Defense.

As the court of appeals clearly stated (*United States* v. *Williams*, 705 F.2d 603, 618 (2d Cir. 1983); App. 31a) the supplemental instruction given by the district court concerning the time for determining predisposition was erroneous. Neither party has challenged that ruling. The parties do differ, however, as to the correct "point of time" on this fundamental issue. Petitioner Williams maintains that the predisposition inquiry should focus on the time when "the Government agent first approached the defendant and began his efforts to induce commission of a crime." Pet. 16. The Government, echoing the appellate court, contends that predisposition should be determined at the later time, after extensive build-up, when the Government agents first suggest to an individual that he commit a crime. Br. in Opp. 9.

The Government's interpretation of the law is much too narrow. It allows the Government to grease the slippery slope, though there is then no predisposition, and to use a period of time to invent, organize and develop an atmosphere leading to crime before actually

suggesting it. Moreover, such a rule would lead to clear, though fortuitous, inconsistencies. When a Government agent approaches an "otherwise innocent" individual, suggests the commission of a crime, and then devotes several months to overcoming that person's reluctance to criminal activities, predisposition would be determined on the date of the agent's first contact with the targeted individual. In other words, the jury would focus on the period of time before the Government interfered in any way with the target's free will. If that same Government agent is more devious, however, and spends several months overcoming the reluctance that indicates a lack of predisposition before suggesting the commission of a crime, then predisposition would be determined at a much later date even though the Government inducements are the same in all meaningful respects. In effect, the Government would be allowed to manufacture a crime in the latter situation, but not in the former. Surely this Court did not intend such an inconsistent result when it established the entrapment defense. *See Sherman* v. *United States*, 356 U.S. 369; *Sorrells* v. *United States*, 287 U.S. 435. On the contrary, the Court meant *pre*disposition to be disposition *before the Government starts working to bring about a crime*, and this does not depend upon the timing of the direct criminal suggestion.

The Government's attempts to justify the inconsistency on the basis that "simply cultivating the friendship of a target preparatory to presenting a criminal opportunity is not inducement to commit a crime." Br. in Opp. 11. That analysis, however, oversimplifies what really happens when a Government agent approaches a target. In addition to feigning friendship, the agent typically uses a wider range of deception to erode his "friend's" resistance to crime. Here, for example, the Government agents dangled great and increasing lures, switched the focus of a legitimate venture concerning the production of paint pigment to one involving titanium metal and

government contracts, and deliberately enlisted the aid of petitioner's friends and acquaintances to induce him to commit a criminal act.[1] Under the Government's analysis, these actions would not support the entrapment defense if they had occurred after the direct suggestion of criminality. The whole purpose of *pre*disposition in the entrapment defense is defeated if such conduct on the part of the Government is disregarded here merely because the numerous government pressures occurred before the criminal suggestion was made. Inconsistencies of this sort will only be avoided if the crucial point for determining predisposition in all entrapment inquiries is the time when the Government agents first approach a target and take steps designed to induce the commission of a crime.

B. The Erroneous Supplemental Instruction Had a "Substantial Influence" on the Jury Verdict.

As the petition shows, this Court has long held that a verdict in a criminal case must be reversed whenever a clearly erroneous jury instruction has a "substantial influence" upon the jury's decision-making process. Pet. 17, *quoting Kotteakos* v. *United States*, 328 U.S. 750, 764-65. Petitioner also contends that such an influence was obvious in this case. Pet. 18-19.

---

[1] The Government's willingness to do everything in its power to *make* a crime appear before the cameras is evident in the following interchange between Mel Weinberg and George Katz:

> GK: He's not a guy, he's not a doer, you know, quietly behind the scenes, you know, he, us, may move a little bit, us (IA) got a lot of confidence in him and Sandy got lots and lots of confidence, but let me tell you this here between you and me, he's in a very, very powerful position here, the committees that he heads, you understand?
>
> MW: Yeah.
>
> GK: But he doesn't use that power for any advantages.
>
> MW: Oh, how can we make him use it?

Ex. FE. (Feinberg Ex. E, June 10, 1979.)

The Government does not dispute this well-established statement of the law. Instead, it implies that the "substantial influence" disappears when the entrapment charge is viewed in its entirety—i.e., the specific instruction plus the "rereading of the full charge on entrapment which correctly set forth the applicable principles." Br. in Opp. 10.[2] First, the cases cited by the Government, which say the charge must be viewed as a whole and not in isolation do not involve *a supplemental instruction responsive to a specific jury question.* A distinct instruction such as this necessarily stands apart from the rest of the charge. *See* Pet. 18. Second, since it was the first charge which led to the jury's question, it is inconceivable that rereading the same charge could have helped to resolve the jury's doubt. In the jury's mind, only the specific instruction answered the timing question. And that instruction was admittedly wrong. In the circumstances in which it was given, it is clear that this erroneous instruction played a crucial role in the verdict in this case.

The Government also argues that the facts of the case are the "most important" countervailing factor against reversal. *See* Br. in Opp. 10. It finds that the "criminal opportunity was accepted when it was first presented," and assumes that the jury would have made the same factual findings. *Id.* But we simply do not know what conclusions the jury would have actually reached in applying a correct charge to the contradictory and massive facts presented during the month-long trial. Nor can we assume, as the Second Circuit did, that the jury would reach a particular result when the petitioner's liberty is at stake. To ensure that the petitioner was found guilty beyond a reasonable doubt, the jury must be allowed to reach a verdict using the proper legal standards.

---

[2] The Government also suggests that reversal is not warranted because the issue was not properly preserved for review. This contention has already been answered in footnote 9 of the Petition.

II. THE ACTIONS OF THE GOVERNMENT AGENTS WERE SO OUTRAGEOUS THAT THEY AMOUNT TO A DENIAL OF DUE PROCESS OF LAW.

Applying standards set by the Government itself,[3] petitioner Williams identifies elements of the Abscam investigations which show the outrageousness of the Government conduct. Pet. 23-27. The Government points to other facts which allegedly show that "agents acted properly at each stage of the investigation." Br. in Opp. 13-14. Not surprisingly, the Government never indicates what standards it used to reach this conclusion. *See id.*

As a preliminary matter, it must be noted that the Government often presents facts in a misleading manner in order to reach its conclusion. It truthfully states that petitioners approached the agents, but fails to point out that petitioners were responding to an apparently legitimate opportunity for financing a legitimate business venture. *See* Br. in Opp. 13. It states that Errichetti described Feinberg as the Senator's "bag man," without mentioning that Weinberg may have instructed Errichetti and others to make such statements in order to convince unsuspecting F.B.I. agents that Senator Williams was in

---

[3] In December of 1976, the Department of Justice ("the Department") promulgated Guidelines on the Use of Informants in Criminal Investigations. DP Ex. 6. F.B.I. Director Webster and Assistant Attorney General Heymann testified that they ostensibly adhered to three additional safeguards adopted to implement the Guidelines in the context of the Abscam investigation. *See* DP Ex. 110. It is these safeguards that the petitioner is now suggesting should form the outer limits of the due process defense.

The Government, in response, implies that these safeguards go beyond constitutional requirements. Br. in Opp. p. 16, n.8. This is surprising, when the high-ranking officials named above previously described the safeguards in terms that reek of due process concerns: i.e., to ensure that such operations are conducted in a "fair" manner, and as essential to the "fair" conduct of an investigation. DP Ex. 110, at 138.

fact corrupt.[4] It attributes the government contract idea to Williams' associate, George Katz, who proposed it in May of 1979, Br. in Opp. 4, 14, but fails to mention that, a month earlier, on April 23, 1979, the Government agent, Mel Weinberg, had raised the question whether "Williams [can] get us the bids on" "government contracts." *See* Pet. 6. Significantly, the Government also excludes the fact that the idea was rejected at that earlier time. *Id.* When these omissions are considered, it becomes apparent that the facts show the deliberate creation of crime by Government agents, instead of the exposure of existing corruption suggested by the Government. Br. in Opp. 14.

More important than the factual disputes, however, is the fundamental problem that both parties to this case are making their outrageous due process arguments in a void. This Court has considered the possibility of a due process defense in an entrapment-like setting only twice. *See Hampton* v. *United States*, 425 U.S. 484; *United*

---

[4] During a March 1, 1979 conversation between one Edward Ellis, and Weinberg, Ellis described Feinberg only as Williams' "man", "boy", or "best man" at his wedding. *See* 128 Cong. Rec. S1497-98 (March 3, 1982). By contrast, in a short conversation occurring on March 5, 1979, attended by F.B.I. Agent McCarthy as well as Weinberg, Ellis referred to Feinberg as Williams' "bag man" on at least five separate occasions. *See* 128 Cong. Rec. S1498-1500. Other excerpts show that Weinberg had planted the bag man notion in Ellis' mind. First, Weinberg and Ellis met a half hour before the March 5 meeting to prepare for it. *See id.* at 1498. Second, in a March 1 telephone conversation with William Hyman, Ellis' partner, Weinberg said that "there's no problem" getting the loan "if he [Ellis] does what I tell him . . . When I spoke to you down in Florida." *Id.* Apparently they had discussed what should be said in advance of this March 1 call. Third, in a March 8 meeting, Errichetti admitted telling Ellis to make the "bag man" statement. *See id.* at 1502. Both Errichetti and Feinberg, contrary to prior assertions, claimed at this time that Ellis had never even met Senator Williams. *Id.* at 1502, 1504. Thus, it seems probable that the bag man notion was in all cases a fabrication contrived by Weinberg.

This matter is referred to further at p. 12, below, and in Appendix C to this brief, pp. 7a-9a.

States v. *Russell*, 411 U.S. 423. In each case the Court was confronted with a specific due process claim relating to the detection of drug-related transactions, and in each case the Court developed a narrow rule to suit the situation.[6] The Court has never defined the type of police over-involvement that would give rise to such a defense. Nor has the Court dealt with the boundaries of the due process defense in areas outside the realm of contraband. Is due process protection limited only to coercion, violence, or brutality to the person? Does it extend to the presentation of unrealistic and excessive financial inducements? Or is it something in between these two extremes, such as the violation of the Guidelines established by the Government to ensure fairness in this investigation? Each of these three alternatives has been presented in this case alone. Other parties and other courts addressing the issue have also used a variety of alternate approaches. Absent an express ruling from this Court on this matter, the lower federal courts will continue to be confronted with a diversity of theories, and they will produce diverse and often incompatible opinions.

As the use of undercover operations by law enforcement agencies becomes more prevalent, the outrageousness/due process defense is likely to be presented to the lower federal courts with increasing frequency. In this situation, this Court should provide clearer and more definitive guidance regarding the elusive but crucial boundary between acceptable conduct, and intolerable conduct, where Government participation in crime is involved, at least as those questions are involved on the facts of this case. The months of active, insidious manipulation and enticement involved here make this case a particularly appropriate one in which this issue should be addressed.

---

[6] The rule that evolved from these cases is that due process is not violated simply because Government agents provided an essential ingredient for the manufacture of an illicit drug or the illicit drug itself, where there was *ongoing* and *preexisting* criminal activity.

III. THE FOURTH AMENDMENT PROHIBITS WARRANTLESS ELECTRONIC SURVEILLANCE WHERE THERE IS NO SUSPICION OF PRIOR OR ONGOING CRIMINAL CONDUCT.

Petitioner Williams contends that the Fourth Amendment was violated when the Government subjected him and his associates to extensive warrantless audio and video surveillance despite the absence of any reason to suspect the appearance of particular criminal conduct. Pet. 27-30. The Government claims, *inter alia*, that the surveillance was justified because it resulted in the accurate presentation of factual evidence to the jury. Br. in Opp. 21. But ends have never justified means where constitutional rights are involved. If ends controlled then there would not be any Fourth Amendment exclusionary rule, since virtually all illegal searches and seizures result in the availability of incriminating and probative evidence. The exclusionary rule exists because the proper concern in a Fourth Amendment context is the intrusion into privacy occasioned by the Government's conduct.

The Government also maintains that all surveillance in this case was "consensual surveillance," approved by this Court in *United States* v. *White*, 401 U.S. 745. As indicated in the Petition, it is doubtful whether *White* was ever intended to apply to the type of facts present in this case. Pet. 29. Moreover, the doctrinal foundation of *White* is substantially inconsistent with *Katz* v. *United States*, 389 U.S. 347, *Terry* v. *Ohio*, 392 U.S. 1, and their progeny. In light of those cases, the Court would be particularly hard-pressed to justify the *commencement* of electronic surveillance without a warrant where no suspicion of criminality exists—which was not the case in *White*. Surely a citizen who, so far as the Government is aware, has not previously engaged in crime or is not expected to engage in a particular crime, has a justifiable expectation that his private conversations will not be surreptitiously intercepted and broadcast to the world, at least not in the absence of a determination by a neu-

tral and detached judicial officer that probable cause for such an invasion of privacy exists. This is surely no more than was decided in *Katz*.

Sustaining what was done here will open the door to virtually unlimited surveillance of all citizens anywhere whenever a policeman or Government officer chooses to do so. Such conduct should be subject to some sort of protection. At the very least, "specific and articulable facts, taken together with rational inferences therefrom" in support of a belief in criminal activity should be required. *Cf. Terry* v. *Ohio*, 392 U.S. 1, 21. The time is ripe for the Court to review the "consensual surveillance" issue to determine whether the consent of a Government agent is sufficient, in the absence of suspicion of prior or ongoing criminal conduct, to remove extensive electronic surveillance from the privacy requirements of the Fourth Amendment.

IV. THE PROCEEDING UNDER SECTION 2255 NOW PENDING IN THE EASTERN DISTRICT OF NEW YORK.

Since the Petition was filed in this case, a proceeding has been filed (on November 14, 1983) by other counsel in the Eastern District of New York seeking a writ of habeas corpus under 28 U.S.C. § 2255. A copy of that petition, with all of the exhibits attached to it, has been lodged with the Clerk of this Court.

The petition under section 2255 is based on several grounds, briefly summarized here, shedding further light on the Government's conduct in this case.

A. Tampering with the January 15, 1980 Video Tape.

The habeas corpus petition asserts that a portion of the important video tape of January 15, 1980 was recorded and then erased. This contention is supported by two affidavits, which are attached as Appendix A and Appendix B to this brief. The entire tape, without erasure, constituted *Brady* material, and is discoverable un-

der Rule 16 of the Federal Rules of Criminal Procedure. The failure of the Government to notify both the court and defense counsel of its failure to preserve the entire taped portion deprived Senator Williams of a significant opportunity to present his defense and violated due process.

B. Exculpatory Evidence Was Improperly Withheld.

More than half of the trial transcript in this case concerned prior transactions in which the prosecution claimed that the Senator used his influence to advance his personal financial interests. There is no doubt that this evidence played an important role and that it was highly influential with the jury. The habeas corpus petition contains a substantial showing that evidence was withheld by the prosecutors, and that this evidence supports the contention that there was no wrongdoing by Senator Williams.

The habeas corpus petition contains material which was obtained in April and May, 1983, pursuant to a request under the Freedom of Information Act. The evidence consists of at least fifty "302 memoranda" from the files of the New York field offices (Brooklyn-Queens) of the Federal Bureau of Investigation. These are memoranda prepared by FBI agents stating the results of their field investigations of individuals concerning Senator Williams' alleged use of his influence in connection with the Biocel and Ritz-Carlton matters.

As made available, none of these 302 memoranda shows any improper use of such influence. In fact, many of the memoranda contain exculpatory statements made in response to the agents' questions.

All of this material was in the Government's hands at the time of trial, yet none of it was made available in response to *Brady* demands made by petitioner's trial counsel. If it had been made available, petitioner's counsel

could have called some or all of these persons as witnesses, and much of the Government's case on predisposition would have collapsed. The opinions of both the trial judge (Pet. App. 79a-80a) and the court of appeals (Pet. App. 43a-44a) show the crucial significance of this evidence which the Government wrongfully withheld.

C. *"Bag Man".*

Probably the most important piece of evidence used against Senator Williams was the statement that Feinberg was a "bag man" for the Senator. This was relied on heavily at the trial, T 1230, 3540, 3794-96, 5152, 5169-70, 5236, 5238, 5243, in the Government's Post-Hearing Memorandum of Law in Opposition to Motions to Dismiss and for a New Trial, pp. 7, 8, 16, 18, 24, 43, 45, and in the Government's brief before the Second Circuit, pp. 2, 4, 21, 23, 37, 42, 47. It was accepted and was obviously influential in Judge Pratt's opinion on the due process arguments, and was referred to by the court of appeals. Pet. App. 7a.

Based upon an affidavit of Edward Ellis, which is attached as Appendix C to this Reply Brief, the petition for habeas corpus asserts that this was at all times a fabrication contrived by Weinberg, the *agent provocateur* Government operative in this case. If, as the habeas corpus petition asserts, the "bag man" epithet was manufactured by Weinberg, this is further and clear support for the contention that the conduct of the Government in this case was outrageous, and a violation of due process.

D. Selective Prosecution.

Senator Williams properly raised the question of selective prosecution before the district court, but that court concluded that Williams was not the victim of selective prosecution.

The petition for habeas corpus makes new allegations with respect to this issue. In particular, it is supported by an affidavit of Joseph Meltzer, which is attached as

Appendix D to this Reply Brief. It is further supported by the affidavit of Edward Ellis, to which reference has already been made, and which appears as Appendix C, *infra*, pp. 7a-9a.

These affidavits, together with the material already set forth in n.4 on p. 7, above, support the view that Williams was improperly targeted in this case, and that, as a part of this planned operation, Ellis was coached by Weinberg to say that Feinberg was a "bag man" for Williams. This was all done by the Government despite the lack of any prior basis for suspecting that Senator Williams had been, was, or would soon be, engaged in the type of criminal conduct they subsequently tried to foment.[6]

Indeed, the only possible basis for subjecting Senator Williams to an investigation after his name was mentioned was the offhand remark of Angelo Errichetti, a person of proven dishonesty, that the Senator had a "bag man," and this statement is now relied upon by the Government in its Brief in Opposition (Br. in Opp. 14). If the "bag man" epithet was wrongfully "prompted" by the Government as a part of its effort to "nail" Senator Williams (see Meltzer affidavit, Appendix D, p. 11a, par. 7, below), the result has obviously been devastating. The affidavit of Edward Ellis, in Appendix C, taken together with the affidavit of Joseph Meltzer, in Appendix D, point in strong terms towards a case of selective prosecution and intentional creation of strongly prejudicial evidence in promoting that prosecution.

---

[6] This is established by the testimony of the Government prosecutor, Thomas Puccio, that he "did not have any personal reason to question Senator Williams' integrity before his name came up in this case," DP 413-14, and was buttressed by FBI agent Good's acquiescence in the statement that the FBI was "starting with a clean slate" in the Williams matter. DP 778.

It is recognized that this material summarized from the habeas corpus petition now pending in the Eastern District of New York is not directly before this Court. However, it may come before this Court, and thus become an integral part of this case.

We urge the Court to grant certiorari now for the reasons stated in the Petition. We think that there are adequate bases for a grant of certiorari at this time. However, if the Court does not now accept that contention, we urge the Court to hold the Petition for Certiorari until the proceedings in the Eastern District of New York have been developed at appropriate hearings there, with possible appeal to the Second Circuit Court of Appeals. Otherwise, the case may have to be reviewed piecemeal, with resulting possible serious injustice to the petitioner.

CONCLUSION

For all of the reasons contained herein, and in the Petition, a writ of certiorari should be granted.

Respectfully submitted,

ERWIN N. GRISWOLD
Counsel of Record
CLAIRE L. SHAPIRO
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 861-3898

GEORGE J. KOELZER
JOEL N. KREIZMAN
EVANS, KOELZER, OSBORNE, KREIZMAN & BASSLER
P.O. Box BB
Red Bank, New Jersey 07701
Counsel for Petitioner

November, 1983

APPENDICES

APPENDIX A

Affidavit of Perry Quaranta

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

80 CR-00575

UNITED STATES OF AMERICA

v.

HARRISON A. WILLIAMS, ET AL.

AFFIDAVIT

COUNTY OF BERGEN :
STATE OF NEW JERSEY : ss

PERRY QUARANTA, being first duly sworn, deposes and says that:

1. I am a citizen of the United States and am over 21 years of age.

2. I am the President of PQ Productions, Inc.

3. I have been involved in the fields of editing, production and directing, first in the film industry (UA-Columbia) and then in the field of video taping.

4. I have been involved in the video tape industry for more than five (5) years as a producer, director and editor and am considered an expert in this field.

5. On September 6, 1983, I examined a video tape recording dated January 15, 1980 between two people. Appearing on this video tape were former United States Senator Harrison A. Williams and an unidentified male

wearing what appeared to be a type of Arab headdress. At the start of this video tape, one camera was situated to show the entry of both men into what appeared to be a living room. After the men approached a sofa and easy chair located on the left side of the picture, there was a switchover to another camera which was located at a different angle. It is obvious on the video tape that there were two cameras used for the video tape recording.

6. Upon a review of the video tape referred to herein, I discovered two "breaks" in the said video tape. The first "break" occuring, as per the timer superimposed on the tape, at 19:15:17; and the second break at 19:20:44.

7. The first "break" lasted for approximately one (1) minute and thirty five (35) seconds as shown by the superimposed timer and was caused by stopping and then restarting the video recorder.

8. The second "break" was caused by editing the tape, i.e. making a re-recording over an existing prior recording, proving that the tape had to have been tampered with in order to make the re-recording change. This break lasted approximately twenty-five (25) seconds as shown by the superimposed timer.

9. Examination of the video tape referred to hereinabove was made with the following equipment: Sony ¾" VO-5850; Micro-time Time Base Corrector-2020; and a Videotek Monitor with cross pulse and underscan.

/s/ Perry Quaranta
PERRY QUARANTA

Subscribed and sworn to before me
this 12th day of September, 1983.

/s/ Anthony Corbello
ANTHONY CORBELLO
A Notary Public of New Jersey
My Commission Expires June 18, 1984

APPENDIX B

Affidavit of Stephen K. Spyker

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

80 CR-00575

UNITED STATES OF AMERICA

v.

HARRISON A. WILLIAMS, ET AL.

AFFIDAVIT

COUNTY OF NEW YORK :
STATE OF NEW YORK : ss

STEPHEN K. SPYKER, being first duly sworn, deposes and says that:

1. I am a citizen of the United States and am over 21 years of age.

2. I am the Chief Engineer of Viedo 44 which is a division of COMPU-EDIT, INC.

3. I have had over ten (10) years experience in video engineering, first in TV broadcasting and later in television production and post-production (editing) and am an expert in the field of video recording.

4. On September 21, 1983, I examined a ¾" tape of former United States Senator Harrison Williams and an-

other person dressed in some form of Arab garb, i.e. wearing what appeared to be a bernoose on his head. The tape was of generally poor quality and appeared to be several generations removed from the original.

5. Upon reviewing the tape I detected the following, with the basis being that at all times that are given are the ones that are superimposed times as shown on the viedotape and given in hours, minutes and seconds. The date superimposed on the videotape was 01-15-80 (i.e. January 15, 1980):

a) At 19:11:23 the recording machine was apparently stopped and then started again at 19:12:46 so that there was an elapsed time of approximately one (1) minute and twenty three (23) seconds missing. After stopping, it took between five (5) and (6) seconds for the videotape recorder to gain enough speed to start producing a picture without any gliches.

b) At 19:20:44 there is another jump to 19:21:09, with twenty five (25) seconds missing. This edit, totally unlike the first at 19:11:23 was what we would call a "clean" edit, meaning that there was no break-up or loss of any video associated with it. This edit could not have been performed by stopping the recorder and then restarting it as apparently was done during the first break.

c) The second "break" had to have been done by using sophisticated video editing equipment designed *specifically* for the purpose of editing videotape and not on a simple recording machine.

d) Since I do not know what equipment was available at the time of the recording, I cannot say for certain that the videotape was doctored at a later date. However, it seems most unlikely that:

1. Video editing equipment of the type required was used to record the original tape or

was in the room with the recording equipment; or

2. If editing equipment was available that the recording technician would bother to make a "clean" edit if his only purpose was to stop and restart the recording, especially since he did not do so on the first break at 19:11:23.

6. I also noticed what I would call a "bump" in the video and audio at 19:10:50 with no apparent loss of continuity in the conversation or the timer. This could have been caused by another "clean" edit. I can think of no other explanation of this, though perhaps there might be one.

7. There is also a point on the tape where it appears that a telephone rings in the room. I understand that testimony has been given that this phone was in another room. I am not expert enough in the field of acoustics, dor do we have the appropriate equipment to analyze the sound of the telephone to say for certain that the telephone was in the same room with Senator Williams, but it does seem to be [the sound of the phone ringing] very close to the micro-phone position.

8. I examined this tape in the presence of other engineers employed by Video 44, all of whom came to the same conclusion as I have.

9. The videotape was examined using the following equipment:

1. Sony BVU-820 Videotape Recorder with dynamic tracking.
2. Sony BVT-800 Time Base Corrector.
3. Sony VO-5600 Video Tape Recorder.
4. Tektronics 690 SR Monitor.
5. Tektronics 650 HR Monitor.

6. Crown D-75 Audio Amplifier.

7. JBL 4313B Loudspeaker.

10. There is no question or doubt in my mind whatsoever that there had been intentional editing of this videotape by use of a re-recording type of editing equipment.

/s/ Stephen K. Spyker
STEPHEN K. SPYKER

Subscribed and sworn to before me
this —— day of September, 1983.

/s/ Lisa D. Rosenbaum
LISA D. ROSENBAUM
Notary Public, State of New York
No. 31-4784661
Qualified in New York County
Commission Expires March 30, 1985

APPENDIX C

Affidavit of Edward Ellis

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

80 CR-00575

UNITED STATES OF AMERICA,
Plaintiff,

—against—

HARRISON A. WILLIAMS, *et al.*,
Defendant.

AFFIDAVIT OF EDWARD ELLIS

STATE OF NEW JERSEY, ss:

I, Edward Ellis, depose and state upon oath, the following:

1. I am the Edward Ellis to whom reference is made in certain audio tapes, made in March, 1979, which tapes were directly relevant to certain aspects of this cause as the same relates to Harrison A. Williams, Jr.

2. I offer this affidavit for the purpose of amplifying, correcting, and explicating certain misapprehensions that exist concerning any and all audio tapes upon which my voice appears. Further, I offer this affidavit in refutation of the innacurate representations made that I knew Alex Feinberg was Senator Williams' "bagman".

3. Prior to the taped conversation with Melvin Weinberg, where I am to have referred to Alex Feinberg as Senator Williams' "bagman", I had an extensive meeting with McLvin Weinberg. The ostensible purpose of this meeting was to obtain financing for Garden State Park.

4. At this meeting with Weinberg (held prior to my meeting with Jack McCloud, a/k/a Jack McCarthy), Weinberg repeatedly used the word "bagman" and referred to Alex Feinberg as Senator Williams' "bagman". I stated to Weinberg that the term "bagman" may be his term, but that I had knowledge of Alex Feinberg only as an honest attorney who was a close friend of Senator Williams. I had, in fact, met Senator Williams only once in my life, very briefly at a fundraiser.

Weinberg insisted that I use the term "bagman", in reference to Alex Feinberg, when I met with Jack McCloud. Weinberg told me that McCloud was an oldtime street politician from Boston, and that I had to use the term "bagman" in order to communicate with McCloud on his level.

Weinberg told me that the word "bagman" did not have a bad connotation in McCloud's way of thinking, and that if I did not identify Feinberg as Williams' "bagman", I would not be able to obtain my financing for Garden State Park.

5. In my association with Alex Feinberg, he never suggested Senator Williams could do anything for my proposed project, and, working toward the end of this project, Alex Feinberg never suggested Senator Williams could do anything by way of assistance (improper or otherwise) regarding this project.

6. At my meeting with Melvin Weinberg prior to the official (on tape) meeting with Jack McCloud, a/k/a Jack McCarthy, chairman of Abdul Enterprises, Inc., Weinberg coached me to say to McCloud that Alex Feinberg was Senator Williams' "bagman". This was not

my term and this was not something I knew anything about. I was told directly by Weinberg that if I refused to call Feinberg Williams' "bagman", I would not receive the funding, but that if I did use that term I would get the funding. I became very angry at Weinberg over this, but Weinberg insisted that the term was "harmless" and that McCloud would not understand the term as being derogatory.

7. I again state unequivocally, that I had no personal knowledge of any sort that Alex Feinberg was Senator Williams' "bagman", and, but for Weinberg's having put the words in my mouth by his intense coaching, and his insistence, I never would have made any such statements.

/s/ Edward Ellis
EDWARD ELLIS

Subscribed and sworn to before me this 11th day of April —, 1983.

/s/ Leslie Ray Smith
LESLIE RAY SMITH

APPENDIX D

Affidavit of Joseph Meltzer

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CR-80-00575

UNITED STATES OF AMERICA

v.

HARRISON A. WILLIAMS, *et al.*

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss

I, Joseph Meltzer, do hereby depose and state under oath as follows:

1. From the Spring of 1978 until the middle part of 1980, I was involved either directly or indirectly in the undercover operation conducted by the Federal Bureau of Investigation and now known as ABSCAM.

2. I was originally "recruited" for this operation by "Mel" Weinberg, with the backing of F.B.I. Special Agent Gunner Askerlin.

3. Originally, the "sting" operation was to be used for the recovery of stolen art and "counterfeit" securities.

4. After being "approved" by the F.B.I. for this operation, I realized that the real purpose of the "sting" was to go after certain politicians.

5. Weinberg coached me on how to get at the politicians, telling me to take them out to dinner, buy them drinks, etc. He further told me that: "If you work hard enough on it, you can get anybody. You can even get the Pope".

6. During the latter part of November or the early part of December, 1978, Weinberg mentioned a number of public officials he had been told to "set up".

7. I specifically recall that he told me he had to "nail" a United States Senator from New Jersey, Harrison Williams, "one way or another" even if he had to "frame" him to make a case.

8. He further told me that he would try to get to Williams by contacting a person he knew by the name of Sy Pollack, who was a good friend of "Bobby" Baker's who in turn was thought to be very friendly with Senator Williams.

9. I had heard of Sy Pollack (mentioned a few times by Weinberg) on a number of occasions, but have met him just once, and only recently.

10. Weinberg also asked me to "go after" United States Senator Lawton Chiles (D. Fla.), which I refused to do.

/s/ Joseph Meltzer
JOSEPH MELTZER

Subscribed and sworn to before me
this 12th day of July, 1983.

/s/ Thomas Hanell
THOMAS HANELL